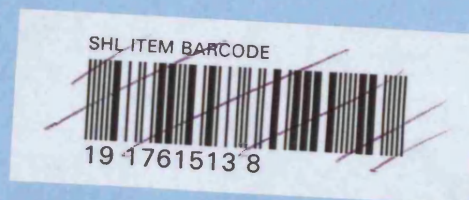


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# Evidential Rules before International Tribunals: Towards Common Principles?

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## Chapter One: Introduction

### 1.1 Introduction:

This thesis plays a part in the recent debate on the fragmentation of international law and the relationship between international tribunals. While much focus has been given to substantive rules of law, this research introduces a new angle through the study of procedural law. Its aim is the examination of evidential rules, bringing novelty by addressing three important questions: a) is there a common set of rules on evidence from the practice of international tribunals?, b) what are the factors influencing international tribunals in the formation of evidential rules?, c) should there be a common set of evidential rules for international tribunals? The answer to these questions will give an insight on what can be said about procedural rules from the perspective of the proliferation of international tribunals and vice versa.

After the examination of how international tribunals treat aspects of evidential rules and identifying the factors that affect their approach, the thesis will propose that a level of commonality in the evidential rules is desired. This conclusion will be backed up by the balancing of the advantages and disadvantages of commonality.

### 1.2 Background and the research:

The research was carried out in the changing landscape of international litigation. In recent years, there has been a proliferation of international tribunals, the phenomenon of the significant increase in their number<sup>1</sup> and the tendency for them to be more specialized<sup>2</sup>. Further, there has also been an increase in the use of international tribunals by States, e.g. before the International Court of Justice (ICJ) and newly created tribunals such as the World Trade Organization Dispute Settlement Body (WTO DSB) and the International Tribunal for the law of the Sea (ITLOS). This change in the landscape of international tribunals has raised many questions. Many scholars argue that it could lead to the fragmentation of international law. In

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<sup>1</sup> See: Chapter 2, Section 3.2, 27-29

<sup>2</sup> See: Chapter 2, Section 2, 14-23

contrast, others think that the proliferation will not have such a direct or substantial impact<sup>3</sup>.

The recent debate has focused on the fragmentation of substantive law and its effects on international law. However, there have been few studies focusing on procedural rules of international tribunals and most of the existing literature is outdated<sup>4</sup>. To answer questions on procedural rules in the context of the proliferation of international tribunals, a fully comprehensive study of all aspects of procedural rules in every international tribunal would be ideal. However, this thesis will only focus on a very important aspect of procedural rules: the evidential rules.

The production of this thesis is timely as part of the general debate on the proliferation of international tribunals and the fragmentation of international law because of two recent developments: a) the Conclusions of the work of the Study Group on the Fragmentation of International Law<sup>5</sup>, b) the recent judgment of the ICJ on the *Genocide Case*<sup>6</sup>. They are significant because, as a simplification, they indicated that international law is becoming a system where norms relate to one another, and where tribunals refer to one another's decision.

### 1.3 The scope of the research:

In order to make the research manageable, it has been narrowed down in two ways.

First, the study will examine three aspects of evidential rules: the standard of proof, expert evidence and *amicus curiae* briefs. They have been chosen because they give a good range of the types of rules, and can be a good indication of the general approach of the tribunals. Rules on the standard of proof are only applied and used by the tribunals. Those on expert evidence involve the parties to a higher degree. Finally, rules on *amicus curiae* submissions also concern entities not part of the proceedings.

Second, the study is limited to three tribunals: the ICJ, ITLOS and the WTO DSB. The practice and the relationship between these tribunals give a good example of how tribunals generally treat the issue of evidential rules. The ICJ was specifically

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<sup>3</sup> See: Chapter 2, Section 3.2, 27-29

<sup>4</sup> The major works in this area are: Sandifer, (1975), Kazazi, (1996), Sands, Mackenzie and Shany, (1999), Rosenne, (1965), Brown, (2004), White, (1965)

<sup>5</sup> International Law Commission, (2006). See: Chapter 2, Section 3.2, 27-29

<sup>6</sup> *The Genocide Case*, ICJ, 2007. See: Chapter 4, Section 3.3.2.3, 79

chosen because it is the only tribunal with universal jurisdiction covering all types of disputes and the only tribunal that is a principal organ of the United Nations. The other two tribunals have been selected because they also have global jurisdiction over civil cases. Further, the three tribunals are active and can be used extensively in the future. Criminal tribunals have not been selected because their treatment of evidential rules is very different to civil cases tribunals. To establish whether there is an emerging commonality, similar tribunals must be compared.

Third, the study, unless otherwise stated, will only examine the practice of tribunals in contentious cases and not advisory opinions. This is because not all the tribunals have jurisdiction to give advisory opinions, and a comparative study has to be done on common aspects.

#### 1.4 The questions of the research:

This investigation of evidential rules of the tribunals will answer three main questions:

##### 1.4.1 Is there a common set of rules on evidence emerging from the practice of international tribunals?<sup>7</sup>

The research examined the provisions and the practice of international tribunals to see whether there is, within this new landscape of international litigation, an emerging commonality on evidential rules. This emerging commonality is the increase in the level of cross-fertilization of evidential rules established and applied by different tribunals. This investigation is significant in many respects.

Detailed examination of the evidential rules of international tribunals has been rare, and most of the existing literature is outdated. This research has brought fresh information to the question of what is the practice of international tribunals on evidence.

Further, an emerging common set of rules would have other implications. First, a dialogue between tribunals resulting in common rules could indicate that they regard themselves as part of a more integrated legal system. This is significant

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<sup>7</sup> See: Chapter 7, Section 2, 248-250

because it would not concur with the “traditional” view of international litigation where tribunals are independent and fragmented. Second, States created tribunals as individual entities. A common approach suggesting tribunals evolving towards an integrated system begs the questions of what has caused this change. Third, from a practical point of view, common evidential rules would mean uniformity. From the perspective of States, this will make international litigation easier. Fourth, there are also implications for the tribunals. If there are common rules on evidence developing from an emerging integrated system, tribunals can arguably formally refer to rules of other tribunals to fill in gaps in their own provisions.

#### 1.4.2 What are the factors influencing the tribunals in the formation of evidential rules?<sup>8</sup>

The second question of the thesis is what factors have a role in influencing the tribunals in their approach to evidential rules. For example, this could comprise a range of factors: a) the awareness and the policies of the tribunals towards commonality, b) the background and the training of the judges, c) the nature of the cases before the tribunals. These are explored throughout the thesis and summarized in the conclusion.

#### 1.4.3 Should there be a common set of evidential rules for international tribunals?<sup>9</sup>

If there is no emerging commonality in the evidential rules of international tribunals, the next question is whether there should be such commonality. This section brings together the answers to the first and the second question of the thesis by reaching a conclusion whether a common set of rules is desirable.

After addressing the advantages and the disadvantages, the thesis proposes that a level of commonality is desired, taking into account the relevant considerations. This conclusion is significant in the new era of the proliferation of international tribunals, indicating that the way in which they are seen has to be reconsidered. Further, the thesis puts forward, mainly from the input of judges, ways in which a level of commonality can be achieved.

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<sup>8</sup> See: Chapter 7, Section 3, 257-265

<sup>9</sup> See: Chapter 7, Section 4, 265-316

### 1.5 The methodology of the thesis:

The methodology of the thesis involved the gathering of information on the practice of international tribunals through three major channels. First, the provisions of the tribunals, including any constituent instruments, are examined. This gives an insight on the explicit powers and limitations of the tribunals on evidential rules. Where relevant, the research also examined other documents concerning the provisions, such as any preparatory work. Second, the study examined the jurisprudence of the tribunals to see how these rules have been applied, and whether the actual practice reflects the provisions. Third, and perhaps most importantly, the research includes interviews with 13 judges of the three selected tribunals on their views on evidential rules<sup>10</sup>. These three sources of information collectively give an insight to the approach of the three tribunals and answer the three questions of the thesis.

### 1.6 The layout of the thesis:

The thesis has been divided into the following seven chapters:

- Chapter one - Introduction: This chapter introduces the thesis by setting out the context within which it is set and lays out the three main questions.
- Chapter two - The development and historical aspects of international litigation: After a short account of how the three chosen tribunals work, this chapter investigates how international litigation has developed and its different phases.
- Chapter three - Understanding international rules from the municipal rules: The third chapter gives a brief introduction into different legal traditions in the municipal context to see whether there has been an influence on the international level.
- Chapter four to six - Standard of Proof, Expert Evidence, *Amicus Curiae* briefs: These three are the substantive chapters and examine the way in which the three chosen tribunals approach the issues. The examination will include looking at the

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<sup>10</sup> The details of the methodology and the results can be found in Appendix A,B, and E.



constituent instruments of the tribunals, the jurisprudence, and information gathered from the interviews.

- Chapter seven - Conclusion: The concluding Chapter brings together the other chapters to answer the three main questions of the thesis. In addition to concluding that a level of commonality of evidential rules is desirable, it will address as to how this can be achieved.

## **Chapter Two: The development and historical aspects of international litigation:**

### **Section 1: Introduction:**

#### **1.1 Introduction:**

One purpose of this chapter is to introduce the selected tribunals. Understanding of the background of the tribunals is crucial for a fruitful study of their evidential rules. In addition, this chapter continues with a study of the history of international tribunals, particularly on the issue of evidential rules<sup>1</sup>. This is done through studying a cross-section of international tribunals on selected issues of evidential rules. The chapter attempts to answer the question of what have been the policy considerations of the tribunals in the earlier part of the history of international litigation. Further, have the policy considerations of the earlier tribunals been carried through to the tribunals today? Alternatively, how has the approach of the earlier international tribunals affected the approach of the tribunals today? And finally, what can we learn from the approach of the earlier tribunals in relation to the existing tribunals?

### **Section 2: Introduction to the three selected tribunals**

#### **2.1 The International Court of Justice<sup>2</sup>:**

##### **2.1.1 The role of the Court:**

The International Court of Justice (ICJ) was created in 1945 after the end of the Second World War to replace its predecessor, the Permanent Court of International Justice<sup>3</sup>. The ICJ was based closely on the PCIJ and it is one of the principal organs of the United Nations<sup>4</sup>. The UN Charter further states that the Court

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<sup>1</sup> The historical account in this chapter is largely drawn from: Sandifer, (1975).

<sup>2</sup> There has been much literature written on the International Court. See generally: Bowett and others, (1997), Rosenne, (1995), Sands, Mackenzie and Shany, (1999), Thirlway, (1996), Rosenne, (2006), Merrills, (1998), Chapter 6-7, Rosenne, (1965), Abi-Saab, (1996), Fitzmaurice, (1986), Jennings, (1997), Muller, Raic and Thuransky, (1997), Oda, (1996), Oda, (1993), Plender, (1991), Rosenne, (1983), Sameh M Amr, (2003), Shaw, (1998)

<sup>3</sup> See further: Fachiri, (1932), Hudson, (1943), Hudson, (1946), Lauterpacht, (1934)

<sup>4</sup> UN Charter, 1945 Article 7

shall function according to its Statute of the Court which is an integral part of the Charter<sup>5</sup>.

The ICJ was created to achieve two main goals. The first goal of the Court is to decide legal disputes between States, in other words, make judgments in contentious cases between States. Because of the fact that the ICJ statute is part of the UN Charter, all members of the UN, and other States which are members of the Statute of the Court and not members of the UN, may bring disputes before the Court.

For the Court to be able to make a ruling on a dispute between States, those States need to give their consent to be under the jurisdiction of the Court. This consent can be established by three methods<sup>6</sup>: (a) upon Special Agreement, (b) through international treaties or conventions, (c) through Article 36(2) of the Statute, otherwise known as “the optional clause”. The parties may refer a dispute of any legal nature to the Court. The only limitation is one which might have been laid down by treaties granting the jurisdiction of the dispute to the Court. The decisions of the ICJ for contentious cases are binding<sup>7</sup>.

The second function of the Court is to give advisory opinions<sup>8</sup>. These are requests from the General Assembly, the Security Council or other authorized United Nations agencies for the opinion of the Court on legal questions that may arise in their activities<sup>9</sup>. The procedures used in advisory opinions are generally very similar to those in contentious cases. Advisory opinions are not legally binding.

States can also request the Court to grant provisional measures to preserve their rights in disputes. These tend to be disputes of a rapidly changing nature, hence urgent need to preserve the rights of the parties. Parties can request provisional measures at any time during the proceedings. Such requests are treated with utmost urgency and will get priority over other cases.

### 2.1.2 The functioning of the Court:

The Court’s primary instrument is the Statute of the Court. It sets out the way in which the Court will function including issues of its composition, organization and jurisdiction. In addition, the Court is also governed by other provisions: a) the Rules

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<sup>5</sup> *UN Charter*, 1945 Article 92

<sup>6</sup> *ICJ Statute*, 1945 Article 36

<sup>7</sup> *UN Charter*, 1945 Article 94

<sup>8</sup> *ICJ Statute*, 1945 Article 65

<sup>9</sup> *ICJ Statute*, 1945 Chapter IV

of the Court, and, b) the Practice Directions. These two instruments provide for procedures of the Court in more detail.

The Statute stipulates that the Court is to decide its cases according to international law which includes treaties, customary international law and general principles of law. In addition, the Court may also use judicial decisions and the teaching of the most highly qualified publicists of the various nations as subsidiary means for the determination of international law<sup>10</sup>.

### 2.1.3 The judges of the Court:

The Court is composed of 15 judges who must be persons of high moral character and should possess qualifications for appointment to the highest judicial office in their own countries or be jurists of recognized competence in international law<sup>11</sup>. They are elected by the General Assembly and the Security Council on renewable nine year terms. The composition of the bench should represent the main forms of civilisations and the principal legal systems. No two judges can have the same nationality<sup>12</sup>. However, in practice, the five permanent members of the Security Council always have one judge on the bench each. The rest are judges representing different regions of the world. The Court elects a President and a Vice-president for a renewable three year term<sup>13</sup>. In cases where a party in a dispute does not have a judge of its nationality on the bench, an *ad hoc* judge can be appointed. They must meet the same requirements as the permanent judges and work on an equality basis<sup>14</sup>. If both parties have the right to appoint *ad hoc* judges, then one party may ask the other for them to both abstain from doing so<sup>15</sup>.

The Court can hear its cases in plenary or in chambers. The plenary has a quorum of nine judges<sup>16</sup>. The Statute of the Court provides for both *ad hoc* and permanent chambers. A permanent chamber may be established by the Court to look at a particular type of dispute<sup>17</sup>. The Court has formed one such Chamber, the Chamber for Environmental Matters. However, it has not been used so far in the

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<sup>10</sup> ICJ Statute, 1945 Article 38

<sup>11</sup> ICJ Statute, 1945 Article 2, Other articles on the judges of the Court: Article 3(1), 4(1), 7(2), 9, 13(1), 21(1), 31(2),(3),(6), 35(1),(2)

<sup>12</sup> ICJ Statute, 1945 Article 3(1)

<sup>13</sup> ICJ Statute, 1945 Article 21(1)

<sup>14</sup> ICJ Statute, 1945 Article 31(6)

<sup>15</sup> ICJ Statute, 1945 Article 35(2)

<sup>16</sup> ICJ Statute, 1945 Article 29

<sup>17</sup> ICJ Statute, 1945 Article 16(1)

history of the Court. *Ad hoc* chambers are formed for particular disputes. According to the Statute, the parties must approve of the number of judges for the *ad hoc* chamber<sup>18</sup>. In its history, the Court has sat in plenary more than in chambers. The procedural rules for the chambers are generally very similar to those when the Court is sitting in plenary.

The Court has a registry with a Registrar and a Deputy-Registrar who are elected on renewable seven year terms. The Registry is responsible for many functions of the Court including important administrative functions, acting as its channel of communications, and publishing and translating the decisions of the Court.

#### 2.1.4 Some basic procedures:

The Court has two official languages: French and English<sup>19</sup>. The parties can decide which language will be used in the proceedings or both languages can be used simultaneously<sup>20</sup>. If the latter is the case, there will be translation into the other official language.

The proceedings of the Court are divided into two stages: the written proceedings and the oral proceedings. At the written proceedings, a Memorial is filed by the applicant and then a Counter-Memorial by the respondent.<sup>21</sup> If the jurisdiction was established through a Special Agreement, the parties may determine the order and number of written submissions. Where the Court considers it necessary, the applicant may then submit a Reply and the respondent a Rejoinder.<sup>22</sup> The ICJ Statute and the Rules of the Court stipulate the detail of the procedures regarding the written proceedings, covering issues of what is to be included and its time frame. Evidence can be introduced to the Court as part of the written submissions. The parties can make arguments referring to relevant evidence which is normally annexed.

The oral arguments take place after the written proceedings. The oral statements are to be as succinct as possible and they must focus on issues which still divide the parties<sup>23</sup>. Evidence can again be introduced at this stage. This is usually done through the oral testimony of witnesses and experts who are called by the

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<sup>18</sup> ICJ Statute, 1945 Article 26(2)

<sup>19</sup> ICJ Statute, 1945 Article 39(1)

<sup>20</sup> ICJ Statute, 1945 Article 39(1), (2)

<sup>21</sup> ICJ Statute, 1945 Article 43(2); Rules of Court, 1978 Article 45(1)

<sup>22</sup> ICJ Statute, 1945 Article 43(2); Rules of Court, 1978 Article 45(2), 46(2)

<sup>23</sup> Rules of Court, 1978 Article 60(1)

parties. The Court can also put questions to these experts. If the Court decides to appoint independent experts, they can also be questioned at the oral proceedings.

A third state may request to intervene in proceedings if it has an interest of a legal nature which may be affected by the decision<sup>24</sup>. In disputes concerning the interpretation of an international convention which has as parties States other than those in dispute, the third party States have the right to intervene in the proceedings.<sup>25</sup> The requirements for third party intervention are set out in the Rules<sup>26</sup>. Multiple proceedings are also possible. The Court can direct proceedings in two or more cases to be formally joined and litigated together<sup>27</sup>.

## 2.2 ITLOS<sup>28</sup>:

### 2.2.1 The functioning of the Tribunal:

The International Tribunal for the Law of the Sea (ITLOS) was created by the United Nations Convention on the Law of the Sea of 1982 (UNCLOS), and it is an important part of the dispute settlement regime set up by the Convention. The Tribunal is governed by Part XV of UNCLOS, the Statute, and other provisions such as the Rules of the Tribunal, the Guidelines concerning the Presentation of Cases before the Tribunal, and the Resolution on the Internal Judicial Practice of the Tribunal. The Tribunal's scope covers issues concerning the interpretation or application of the Convention, or other agreements related to its purposes.

The Tribunal can be used by State parties to the Convention, and in specific circumstances, other States, non-State entities including private individuals and corporations, and international organizations<sup>29</sup>.

Disputes which arise under UNCLOS are subject to compulsory settlement according the Part XV of the Convention, with some exceptions. The Tribunal is one of the fora which a State can chose according to Article 287 of the Convention. ITLOS has mandatory jurisdiction over some areas of UNCLOS such as the prompt

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<sup>24</sup> *ICJ Statute*, 1945 Article 62

<sup>25</sup> *ICJ Statute*, 1945 Article 63

<sup>26</sup> *Rules of Court*, 1978 Article 81, 82

<sup>27</sup> *Rules of Court*, 1978 Article 47

<sup>28</sup> On ITLOS, see generally: Adede, (1987), Eiriksson, (1997), Mensah, (1997), Nelson, (1997), Sands, Mackenzie and Shany, (1999), Treves, (1999), Treves, (2000), Anderson, (1998), Churchill, (1998), Lowe, (2001)

<sup>29</sup> *Statute of ITLOS*, 1982 Article 20



release of vessels, the request for provisional measures, and issues concerning the sea-bed area.

### 2.2.2 The judges of the Tribunal:

ITLOS has 21 judges who are elected by the State parties to UNCLOS. They must be persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea<sup>30</sup>. Like the ICJ, the selection of the judges must represent the principal legal systems of the world and ensure equitable distribution. No two judges can have the same nationality. The terms of the judges are 9 years and renewable. Parties to a dispute are entitled to have a judge of their nationality on the bench, and if there is no permanent judge of their nationality, an *ad hoc* judge may be appointed with equal footing to the permanent judges.

The Tribunal normally hears its cases in plenary, with a quorum of 11 judges<sup>31</sup>. It can also hear cases in chambers, which are composed of three or more judges. So far, the Tribunal has established two chambers: the Chamber for Fisheries Dispute and the Chamber for Marine Environment Disputes. According to Part XI of UNCLOS, the Seabed Disputes Chamber of the tribunal has exclusive and compulsory jurisdiction over disputes on activities in the sea-bed area. If the parties agree, a special *ad hoc* chamber can also be formed to deal with a particular dispute<sup>32</sup>. The Tribunal is to determine the composition of such a chamber with the approval of the parties.

ITLOS has a registry. It serves as the secretariat to the Tribunal, performing many functions including acting as the channel of communication between the parties and the Tribunal, handling documents and providing translation and interpretation services. The Registrar and Deputy Registrar are elected on renewable seven year terms.

### 2.2.3 Some basic procedures:

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<sup>30</sup> Statute of ITLOS, 1982 Article 2(1)

<sup>31</sup> Statute of ITLOS, 1982 Article 13

<sup>32</sup> Statute of ITLOS, 1982 Article 15(2)

Disputes before ITLOS are decided according to the substantive rules of UNCLOS and general international law not incompatible with the Convention<sup>33</sup>. The Tribunal can also decide cases *ex aequo et bono* should the parties agree.

The two official languages of ITLOS are French and English<sup>34</sup>. The pleadings are to be in one or both of the official languages, but in cases where a party wants to submit its pleadings in another language, a certified translation into an official language must be produced.

The proceedings before ITLOS consist of two parts: the written and the oral proceedings. Where there was an application to commence the case, a Memorial is submitted by the applicant and a Counter-Memorial by the respondent<sup>35</sup>. If needed, the Tribunal may authorize the applicant to file a Reply and the respondent a Rejoinder. The number, order and time limits for the submissions are determined by the Tribunal. In cases where the dispute is submitted by special agreement, the procedures are to be determined by that agreement unless the Tribunal, after consulting the parties, decides otherwise<sup>36</sup>. Similar to the ICJ, the evidence can be submitted to the Tribunal at both the written and oral stages. It can be annexed to the written submissions.

The oral arguments start once the written proceedings are finished and the judges have exchanged views<sup>37</sup>. The Tribunal determines the procedure of the oral arguments. The statements should be as succinct as possible and should focus on the issues that still divide the parties after the written proceedings<sup>38</sup>. The Tribunal can ask any questions and seek clarification from the parties<sup>39</sup>. During the oral stage, the parties may call on witnesses and experts if a list is submitted to the Registrar in sufficient time<sup>40</sup>. The parties as well as the Tribunal can put forward questions to the witnesses and experts<sup>41</sup>. If the Tribunal decides to appoint its own experts, then they can also be questioned at the oral stage of the proceedings.

Should a third party consider that its interest of a legal nature can be affected by the decision of the Tribunal in the dispute, it may request to intervene<sup>42</sup>. In

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<sup>33</sup> UNCLOS, 1982 Article 293(1)

<sup>34</sup> Rules of ITLOS, 2001 Article 43

<sup>35</sup> Rules of ITLOS, 2001 Article 60(1)

<sup>36</sup> Rules of ITLOS, 2001 Article 61(1)

<sup>37</sup> Rules of ITLOS, 2001 Article 68

<sup>38</sup> Rules of ITLOS, 2001 Article 75 (1)

<sup>39</sup> Rules of ITLOS, 2001 Article 76(2)

<sup>40</sup> Rules of ITLOS, 2001 Article 72, 78

<sup>41</sup> Rules of ITLOS, 2001 Article 80

<sup>42</sup> Statute of ITLOS, 1982 Article 31

addition, Article 32 of the Statute allows for third parties to intervene in cases which concern an interpretation of a treaty to which that State is a party (e.g. UNCLOS or one conferring jurisdiction on the Tribunal). If the request for the intervention is granted by the Tribunal, the intervening party will receive copies of the pleadings and other documents. They will be entitled to participate in both the written and oral pleadings. The Tribunal can also hear cases which involve more than two parties: multiple proceedings. In cases where they are filed separately, the Tribunal may order the proceedings to be joined<sup>43</sup>.

International organizations which are not party to a dispute can submit a memorial with relevant information before the end of the written pleadings<sup>44</sup>. The Tribunal can also request information from international organizations on its own initiative. In cases where an organization's instrument or international convention adopted under an organization is in question, the Tribunal will invite observations on those particular issues from the relevant organization.

Regarding scientific experts, the Tribunal may select two or more scientific or technical experts on its own initiative or at the request of a party<sup>45</sup>. It is preferred that the experts are chosen from lists maintained by international organizations according to Annex VIII of UNCLOS. Experts should be independent and enjoy the highest reputation for fairness, competence and integrity<sup>46</sup>. If necessary, the Tribunal can arrange for an inquiry or an expert opinion on a particular issue after hearing the parties. Under such circumstances, ITLOS is to determine the details of such an inquiry including the subject matter, the number of experts and the procedures<sup>47</sup>.

ITLOS can also render advisory opinions where another agreement related to the purpose of UNCLOS provides for it. In the context of UNCLOS, the Seabed Disputes Chamber is authorized to give advisory opinions at the request of the Assembly or Council of the International Seabed Authority on questions that arise in their activities.

## 2.3 The World Trade Organization Dispute Settlement Body (WTO DSB)<sup>48</sup>

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<sup>43</sup> *Rules of ITLOS*, 2001 Article 47

<sup>44</sup> *Rules of ITLOS*, 2001 Article 84

<sup>45</sup> *UNCLOS*, 1982 Article 289

<sup>46</sup> *Rules of ITLOS*, 2001 Article 15(3)

<sup>47</sup> *Rules of ITLOS*, 2001 Article 82(2)

<sup>48</sup> General literature include: Cameron and Campbell, (1998); Jackson, (1997); Petersmann, (1997b); Petersmann, (1997a); Sands, Mackenzie and Shany, (1999), GATT, (1994), Marceau, (2001), McRae, (2004), Palmetier and Mavroidis, (2004), Matsushita, Schoenbaum and Macvroidis, (2003), Petersmann, (1995), Steger and Hainsworth, (1998), Stewart and Dwyer, (2003), Waincymer, (2002), Watts, (2000)

### 2.3.1 The functioning of the DSB:

The WTO DSB was established by the Marrakesh Agreement (1994) that also created the new World Trade Organization to regulate international trade and replacing the old General Agreement on Tariffs and Trade (GATT).

Annexed to the Marrakesh Agreement, the Dispute Settlement Understanding (DSU)'s purpose is to resolve disputes under the WTO Agreement and its related agreements. The DSU established the Dispute Settlement Body (DSB) comprising *ad hoc* panels and a permanent Appellate Body (AB).

The WTO dispute settlement system is governed by various instruments including: (a) the Agreement Establishing the WTO, (b) the Dispute Settlement Understanding (Annex 2 of the WTO Agreement), (c) Working Procedures ("Panel Working Procedures") (Appendix 3 to the DSU), (d) Working Procedures for Appellate Review ("Appellate Body Working Procedures"), (e) Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes ("Rules of Conduct").

Appendix 1 of the DSU provides a list of the agreements covered by the Understanding. It includes the WTO agreement, Multilateral Trade Agreements and Plurilateral Trade Agreements. The contents of these agreements are the substantive rules to be applied by the DSB. The provisions of the WTO DSB do not refer to general public international law as the applied substantive law. However, in *US – Standards for Reformulated and Conventional Gasoline*, the first case before the AB, it was stated that trade rules are not to be read in clinical isolation from public international law<sup>49</sup>.

The body of first instance of the WTO DSB is the panel. There are normally three panelists in a panel, but parties can request an increase to five<sup>50</sup>. The panelists are proposed by the WTO Secretariat usually from a list of prospective panel members, put forward by members of the WTO and approved by the DSB. The Parties are expected to agree unless they have compelling reasons not to<sup>51</sup>. Citizens

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<sup>49</sup> *USA - Gasoline Case*, WTO DSB, 1996, 18

<sup>50</sup> *Dispute Settlement Understanding*, 1994 Article 8(5)

<sup>51</sup> *Dispute Settlement Understanding*, 1994 Article 8(6)

of Members parties to a dispute are not to serve as panelists, unless the parties agree otherwise.<sup>52</sup>

The WTO DSB has an appeal system limited to legal issues already addressed by the panels. In practice, however, the AB does look into issues that the panel had not previously considered<sup>53</sup>. The AB has seven members elected by the DSB on a four year term which is renewable once. The AB members rotate to sit in divisions of three for a particular case. They are independent experts recognized in international trade law<sup>54</sup>. The AB is headed by a Chairman elected for a one year term and each three member division is headed by a Presiding Member. The Working Procedures for Appellate Review have provisions to ensure consistency in the rulings by requiring members of the AB to meet on a regular basis to discuss matters of policy, practice and procedure. Consistency in the rulings is further ensured by the requirement that the division considering a particular appeal must exchange views with other AB members before finalizing the report<sup>55</sup>.

The administrative tasks of the panels are handled by the WTO Secretariat. The Legal Affairs Division normally provides the panels with help on legal and procedural aspects of the dispute. The AB has its own Secretariat with similar supportive roles to the panel's.

The WTO DSB has compulsory jurisdiction over all disputes arising under the WTO. Non-Members do not have standing. The jurisdiction of the WTO DSB only covers contentious cases and not advisory opinions. The panel reports are not *ipso facto* binding upon the litigant parties, but only recommendations until they have been adopted by the DSB. However, the DSB must adopt the reports unless there is a consensus not to. In practice, the reports are always adopted and become binding on the parties.

### 2.3.2 Some basic procedures:

The conditions for initiating proceedings before the WTO DSB are governed by Article XXIII of GATT 1994, or corresponding provisions of other Agreements.

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<sup>52</sup> *Dispute Settlement Understanding*, 1994 Article 8(6)

<sup>53</sup> E.g. AB report of *Canada - Periodicals Case*, WTO DSB, 1997, 449

<sup>54</sup> *Dispute Settlement Understanding*, 1994 Article 17

<sup>55</sup> *Appellate Body Working Procedure*, 2005 Rule 4

But the jurisdiction only extends to cases initiated after the WTO Agreement has come into force.

The WTO system encourages parties to resolve their dispute through consultation, good offices, conciliation and mediation. The establishment of a panel may only be done by a party after 60 days counting from when it submitted a request for consultation to the other party, and if the consultation fails (20 days for urgent cases)<sup>56</sup>. However, the parties may agree to submit the dispute to a panel before the expiration of the 60 days or extend the period to encourage other means of settling the dispute. The DSB must take its decision to adopt the report within 60 days from when the panel report is circulated to the WTO members but not before 20 days. The submission for the appeal process must be before the DSB adopts the report.

The WTO panel may seek information from any individual or body as it considers appropriate, given that the Member State with the jurisdiction over that individual or body has been notified. The panel may also appoint an expert review group, composed of leading experts in the field, to prepare an advisory report. The rules which govern this procedure are contained in Appendix 4 of the DSU.

The official languages of the WTO are French, Spanish and English. The parties may use anyone of these in the proceedings. The proceedings before the WTO DSB also have two stages: written and oral.

The rules on written submissions are regulated by the panel with some limitations such as the time limits<sup>57</sup>. In principle, the complaining party submits their submissions first but the panel can decide that the parties should do so simultaneously<sup>58</sup>. The parties should submit written rebuttals within two or three weeks of the first session<sup>59</sup>. The panel can request the parties to explain any specific questions<sup>60</sup>. Evidence can be incorporated as part of the written submissions.

As for the oral stage, the complainant is to present arguments first followed by the respondent. This takes place at the first meeting. At the second meeting, the respondent makes its oral rebuttal first, and the complainant is called to make their case. The panel can ask any questions to both parties during the oral stage. Evidence

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<sup>56</sup> *Dispute Settlement Understanding*, 1994 Article 4(3), 4(7), (8), (9) 5(4). The panel and the AB cannot issue provisional measures but urgent cases can be accelerated, e.g. cases involving perishable goods.

<sup>57</sup> Appendix 3 of *Dispute Settlement Understanding*, 1994

<sup>58</sup> *Dispute Settlement Understanding*, 1994 Article 12(6)

<sup>59</sup> *Dispute Settlement Understanding*, 1994 Article 12(6)

<sup>60</sup> *Dispute Settlement Understanding*, 1994 Appendix 3, Panel Working Procedures, Rule 8



can be presented by the parties at the oral stage. Any experts appointed by the panel could also be asked questions at this stage.

A third party with a substantial interest in a case pending before the panel can join the proceedings as an intervener<sup>61</sup>. The panel can arrange a special meeting to hear the third parties' views and they can also make written submissions to the panel. In addition, in cases where another WTO Member meets the jurisdictional requirements, it can also initiate proceedings regarding the same dispute<sup>62</sup>. If it is possible, the DSB will refer the case to the same panel.

There is no provision in the DSU allowing non-governmental *amicus curiae* submissions. However, according to Article 13 of the DSU, panels have the right to ask for information from any individual or body they deem appropriate<sup>63</sup>.

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<sup>61</sup> *Dispute Settlement Understanding*, 1994 Article 10(2)

<sup>62</sup> *Dispute Settlement Understanding*, 1994 Article 10(4)

<sup>63</sup> See Chapter 5, Section 5.2, 161

## Section 3: The International Legal Order

### 3.1 The Nature of the International Legal Order:

International law is different to municipal law. A distinctive feature of the international legal order is that there is no legislating body. International law is generally agreed as deriving from a number of sources including treaties and custom<sup>64</sup>.

In addition, and more relevant to this thesis, there is no centralized body for dispute settlement, to be distinguished from the municipal context where cases are dealt with in a hierarchical and centralized system<sup>65</sup>. The international arena consists of many different tribunals established by treaties between States<sup>66</sup>. Each tribunal is autonomous, independent and segregated from one another<sup>67</sup>.

The *De Merode Case* before the World Bank Administrative Tribunal illustrates the independent nature of international tribunals. The case concerns a dispute between the Bank and its employees about actions taken by the Bank concerning the remuneration of its employees to the effect that the money received by them was not as high as expected. Significantly for the purposes of this study, the Tribunal stated that it “does not overlook the fact...that the differences between one organization and another are so obvious that the notion of a common law of international organization must be subject to numerous and sometimes significant qualifications. But the fact that these differences exist does not exclude the possibility that similar conditions may affect the solution of comparable problems. While the various international administrative tribunals do not consider themselves bound by each other’s decision...it is...true that on certain points the solutions reached are not significantly different. It even happens that the judgment of one tribunal may refer to the jurisprudence of another.”<sup>68</sup> Throughout the judgment, the tribunal refers to practice of the United Nations regarding particular issues it was discussing<sup>69</sup>.

Even though the *De Merode Case* concerned tribunals within the context of international organizations, it underlined that international tribunals are independent

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<sup>64</sup> *ICJ Statute*, 1945 article 38

<sup>65</sup> Examples the highest court include: a) the House of Lords in England, b) the Supreme Court in the United States and, c) the Cour de Cassation or the Conseil d’Etat in France.

<sup>66</sup> See generally on the law of treaties: Aust, (2000)

<sup>67</sup> See further: Shany, (2003) 94-99, Conmbacau, (1986) 90

<sup>68</sup> *Louis de Merode*, World Bank Administrative Tribunal, 1981, 13

<sup>69</sup> See further: *Louis de Merode*, Tribunal, 1981, 19, 26, 33, 42-43

of one another and that their jurisprudence is not binding upon one another in any way. However, tribunals may look at another's jurisprudence in an attempt to adopt its own.

### 3.2 The “proliferation” of international courts and tribunals:

The “traditional view” of international law has to be re-examined in light of the proliferation of international tribunals<sup>70</sup>. This proliferation describes phenomenon of the growing number of international tribunals, and their increasing specialization. The recent work of the Study Group on the Fragmentation of International Law under the auspices of the ILC is of note. Although it mainly addressed substantive law, it also has bearing on the debate on international litigation.

#### 3.2.1 The recognition of the fragmentation of international law and specialization:

The conclusions of the study recognized the fragmentation of international law, possible conflict of laws, and the overlapping jurisdiction of international tribunals<sup>71</sup>. Further, it noted the emergence of rules and legal institutions which are specialized and autonomous<sup>72</sup>. For the purpose of this study, what must be noted is the increase in the number of specialized tribunals.

New tribunals have been created to focus on an aspect of international law or disputes arising in a geographical region. An example of a regional tribunal is the European Court of Justice (ECJ). Other specialized tribunals include:

- Human rights law: European Court of Human Rights (ECHR)
- International criminal law: International Criminal Court, International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR)
- International trade law: World Trade Organization Dispute Settlement Body (WTO DSB)
- Investment: International Centre for the Settlement of International Dispute (ICSID)

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<sup>70</sup> This has been the subject of much debate, the details of which will not be dwelled upon here. See: G Guillaume, (2000), Kingsbury, (1999), Romano, (1999), Charney, (1999), Treves, (1999), Abi-Saab, (1999), Guillaume, (2004), Buergenthal, (2001), Treves, (2000), Shany, (2003) Charney, (1998), Boyle, (1997), Hafner, (1998), Dupuy, (1999), Schwebel, (2000)

<sup>71</sup> Study Group: Analytical study, (2006) para 5-8.

<sup>72</sup> Study Group: Analytical study, (2006) para 8

- The Law of the Sea: International Tribunal for the Law of the Sea (ITLOS)

In addition, litigants before these new tribunals include other stakeholders in international law: individuals, corporations, and NGOs. This is different from the “classical” view of international law where States are the sole litigants.

### 3.2.2 The debate on proliferation:

Many scholars have suggested that the simultaneous use of international tribunals has always been the norm<sup>73</sup>, but it has been on the increase. There have been further suggestions that the proliferation of tribunals has been partly a result of the demand for more specialization of tribunals<sup>74</sup>. Shany has suggested that States have been more willing to submit disputes to third party litigation. Further, the proliferation has been a result of globalization where there has been more interaction between States and the creation of international treaties<sup>75</sup>.

The debate on the fragmentation of international law and the proliferation of international tribunals has been substantial. “Some commentators have been highly critical of what they have seen as the erosion of general international law, emergence of conflicting jurisprudence, forum-shopping and loss of legal security. Others have seen here a merely technical problem that has emerged naturally with the increase of international activity may be controlled by the use of technical streamlining and coordination.”<sup>76</sup>

More specifically to international tribunals, the proliferation has underlined the fact that they exist as individual and separate entities<sup>77</sup>. There are scholars, notably former President Guillaume of the ICJ, who argue that the proliferation could lead to the fragmentation of international law<sup>78</sup>. Some have pointed out that it could also lead to conflicting decisions from different tribunals<sup>79</sup>, and forum shopping<sup>80</sup>. However, there are other scholars, notably President Higgins of the ICJ, who consider that the proliferation could have an effect on the integrity of international law but that it is not as big a threat as some has made it out to be<sup>81</sup>. The proliferation also raises

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<sup>73</sup> Lauterpacht, (1991) 10

<sup>74</sup> Lauterpacht, (1991) 14-22

<sup>75</sup> See further: Shany, (2003) 3-4

<sup>76</sup> Study Group: Analytical study, (2006) para 9. See also the literature therein.

<sup>77</sup> See further: Shany, (2003) 94-99

<sup>78</sup> For example: Guillaume, (2004), Guillaume, (2000), Guillaume, (1995)

<sup>79</sup> See, for example: Charney, (1999) 704-708, Brown, (2002) 460-464

<sup>80</sup> Treves, (1997) 418, see also: Shany, (2003) 133-134

<sup>81</sup> Higgins, (2006) and Higgins, (2003)

questions of the relationship between the international tribunals, and whether deference should be granted to the ICJ because it is the only international tribunal that is a principal organ of the United Nations. Further, there are also questions as to the relationship between general international law and *lex specialis*<sup>82</sup>.

### 3.3 The development of international tribunals:

From the outset, it is important to note that States also have other means to settle their disputes as alternatives to binding third party settlement<sup>83</sup>: e.g. a) negotiation, a way in which disputes can be settled without a third party, b) mediation, c) conciliation<sup>84</sup>. This section will give an outline of the development of international tribunals to show their progress and how they have changed.

#### 3.3.1 The five main eras of international litigation:

For the purposes of this study, the history of international litigation has been divided into five main eras. The beginning of each era is determined by the initiation of a new method of dispute settlement or a particular dispute settlement body which brought about some change in the way in which international litigation was carried out.

However, what must be made clear from the outset is that, even though a particular period was marked by new or a change in settlement bodies, States were not limited to those fora. For example, during the period which the ICJ was the significant player in international litigation, many States still opted for arbitrations<sup>85</sup>.

##### 3.3.1.1 The Early Years, pre-1899:

The Early Years is the earliest period of international dispute settlement, defined here as pre-1899. It is the beginning of international dispute settlement in the formal context where third parties are involved. *Ad hoc* arbitration and mixed commissions emerged in this period. Arbitrations would be set up on agreement of

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<sup>82</sup> See further: Pauwelyn, (2001) 535, Higgins, (2003) in particular 17-20, Higgins, (1997), Oxman, (2001) 309-312, International Law Commission, (2006) 30-114

<sup>83</sup> See generally: Aldrich and Chinkin, (2000a), Institute, (1987)

<sup>84</sup> On the various types of dispute settlement mechanisms, see: Merrills, (1998) 91-237

<sup>85</sup> On the relationship between the ICJ and other tribunals, see: Lauterpacht, (1991) 11

the States in dispute, and usually designed to be specific to it. Mixed commissions tended to include equal numbers of representatives from the two States in dispute.

However, these dispute settlement processes were still very much in control of the States. They were able to decide on the details and had the freedom to appoint the arbitrators and commissioners of their choice. Subject to agreement of the other party, they were able to control all aspects of the proceedings, including the procedural rules<sup>86</sup>.

### 3.3.1.2 The Two Hague Conventions, 1899-1920:

The first Hague Convention was created in 1899. The modified version, or the second Hague Convention, was agreed upon in 1907. The Permanent Court of Arbitration was also created at the time of the two Hague Conventions<sup>87</sup>. This period is significant because there was a set of rules laid down to be applied to more than one international dispute. The Conventions also introduced a set of procedural rules for arbitrations. This meant that, for the first time, States were willing to accept that there should be an international standard of procedural rules indicating that they would not have complete freedom over the rules of the proceedings<sup>88</sup>.

The Hague Conventions had provisions for a list of arbitrators to be compiled, from which States could choose their arbitrators. The procedural rules and the power of the tribunals were defined more clearly. However, States were not obliged to adopt these rules but they were only guidelines<sup>89</sup>. States were able to adopt their own approach to litigation as before.

In the two eras just mentioned, States used arbitrations and mixed commissions as the third party dispute settlement process of choice. However, their use was not limited to these two eras, but extended to modern times. These first two periods saw their creation and their initial use<sup>90</sup>.

### 3.3.1.3 The Years of the Permanent Court, 1920-1942:

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<sup>86</sup> See: Sandifer, (1975) 4-22

<sup>87</sup> See: Merrills, (1999) 3-31

<sup>88</sup> See for a general and historical discussion on the Peace Conference: Aldrich and Chinkin, (2000b) in particular 90-92, Caron, (2000)

<sup>89</sup> On the nature of arbitrations in general, see: Merrills, (1998), Chapter 5

<sup>90</sup> See further: Gray and Kingsbury, (1992)

The introduction of Central American Court of Justice (CACJ) and the Permanent Court of International Justice (PCIJ) can be considered a crucial landmark. As well as the option of going to arbitration, from this point onwards, States could go before these permanent tribunals.

The rules of the proceedings already existed in these courts and were fixed. It was no longer up to the States to decide the specific details of the dispute settlement process. The question for the States was whether they would litigate before the existing bodies. States no longer had the freedom to choose their own rules before these permanent tribunals, and consequently less power to control the proceedings.

A novelty that was introduced by the PCIJ was the “optional clause” which, for the first time in the history of international litigation, brought States under the compulsory and general jurisdiction of the Court<sup>91</sup>. In other words, the Permanent Court was a “court” similar to courts in the municipal context. Even though the CACJ and the PCIJ did not function for very long, they were a novel concept in international litigation<sup>92</sup>.

#### 3.3.1.4 The Introduction of the International Court of Justice, from 1945:

Recognizing problems that existed with the PCIJ, the signatories of the United Nations Charter created the International Court of Justice<sup>93</sup>. The ICJ replaced the PCIJ, carrying on the notion of the World Court, taking on many of its characteristics, but simultaneously incorporating many new elements.

The most significant contribution of the ICJ to international litigation is perhaps that, because it is working under the ambit of the United Nations, it is the first court that truly has global jurisdiction covering every type of inter-State dispute. Compared to the courts that existed before it, the ICJ has been operating for a much longer period of time. There were many cases before the Court during the few decades following its creation.

#### 3.3.1.5 The Proliferation, a few decades ago – present time:

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<sup>91</sup> See: [http://www.worldcourts.com/pcij/eng/conventions/1942.12.31\\_optional.htm](http://www.worldcourts.com/pcij/eng/conventions/1942.12.31_optional.htm), for States signed up to the “optional clause”

<sup>92</sup> See further on the PCIJ: Rosenne, (1995) 15-21

<sup>93</sup> Refer to the general literature cited Chapter 2, Section 2.1, 14

The proliferation of international tribunals has intensified during the past decade. There has been a substantial increase in the number of tribunals, in particular those which are specialized<sup>94</sup>. The ICJ arguably has had to play a less significant role in light of the many tribunals created to deal with specific types of disputes. States have more choice on how to settle their disputes. The range of tribunals has raised the question of forum shopping; States basing their choice on the benefits that might be derived from the different approaches in various aspects of tribunals<sup>95</sup>.

## Section 4: Evidential rules before international tribunals

### 4.1 Introduction:

This section will give a brief introduction on some how different tribunals deal with evidentiary issue in the different eras of international law as defined in the previous section<sup>96</sup>. A thorough examination of all the jurisprudence stretches beyond the scope of this thesis.

#### 4.1.1 The Early Years:

International litigation in the Early Years generally comprised *ad hoc* arbitrations and mixed commissions. Evidential rules of these two types of bodies mainly derived from the agreement drafted with the consent of the litigant States (often in the form of treaties), incorporating what rules the States saw fit. Most arbitrations of this period involved European States and the United States.

The arbitral tribunals and the mixed commissions in this period adopted a very liberal approach to evidential rules, with the emphasis on the needs of the litigant States. Some agreements virtually grant unlimited powers to the tribunal<sup>97</sup>, and some have restrictions<sup>98</sup>. In cases where there is an absence of a rule from the agreement, the tribunals may create their own. Tribunals may also be inclined to look at the practice of other tribunals, but this is not obligatory.

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<sup>94</sup> See: Chapter 2, Section 3.2, 27-29

<sup>95</sup> See the list of literature in footnote 70

<sup>96</sup> See generally: Brower, (1994), Sandifer, (1975), Kazazi, (1996), Amerasinghe, (2005), Mani, (1980), Moore, (1929)

<sup>97</sup> Agreement in the Delogoa Bay Railway Arbitration Case, Moore, (1898) 1877, Volume 2

<sup>98</sup> For a list of common restrictions, see Sandifer, (1975) 37



Lauterpacht noted that there is much flexibility in the evidential rules of international arbitrations. In his words: “There has been a general tendency, sanctioned by a long series of arbitral pronouncements, to disregard elaborate restrictions upon the admissibility of evidence and to accept the principle that no evidence should be excluded *a limine* and that it should be left to the judge to appreciate the weight and persuasiveness of the evidence put before him”<sup>99</sup>.

During this era of litigation, tribunals adopted an inquisitorial approach to litigation (i.e. seeking information), rather than imposing restrictive rules of evidence. For example, the Joint Commission for the United States and Panama said in its report: “With reference to the admissibility of evidence, the Commission will follow the procedure of a commission of inquiry rather than the technical rules of evidence”<sup>100</sup>.

The approach of having few restrictive rules can be seen in the jurisprudence of the period. The *Dowman Case* showed that the admission of evidence was open with few restrictive rules. In the case, there was a question regarding the testimony of certain slaves. It was held by the Board of Commissioners that the testimony might “with entire safety be heard by the board; examined, weighed and cautiously considered, received or rejected according to the circumstances.”<sup>101</sup>

In the *Fur Seal Arbitration Case*, Sir Charles Russell, arguing before the tribunal, said that the practice of admitting all types of evidence without regard to “the character, the antecedents, the trustworthiness” of the witnesses is due to the exigencies of the situations presented and the character of the tribunals<sup>102</sup>.

On this issue, Sandifer elaborated on the particularities of claims commissions, those set up between two States to deal with claims of individuals of one State against the other. He stated: “The same practice of liberal admission obtains generally in claims commissions, although the application of stricter rules might be expected there because of the fact that the real parties in interest in the prosecution of the claims are private persons, although the defendant is the State, and the questions involved more nearly assimilable to those arising in municipal litigation. This practice is due no doubt to...the extreme difficulties...in obtaining adequate evidence.”<sup>103</sup> However, it

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<sup>99</sup> Lauterpacht, (1931) 31

<sup>100</sup> Joint Commission, (1920), 22

<sup>101</sup> *The Dowman Case*, Domestic Claims Commission(United States), 1827

<sup>102</sup> *The Fur Seal Arbitration Case*, Arbitral Tribunal, 1895, 59, Volume 11

<sup>103</sup> Sandifer, (1975) 181-182. For discussion on judges’ hesitation to exclude evidence because the difficulties in obtaining it: see Sandifer, (1975) 54, 81 Section 5

cannot be generally said that the evidential rules of mixed claims commissions are stricter than arbitral tribunals. Neither can it be said that the rules of the claim commissions became stricter with time<sup>104</sup>.

The practice of international tribunals of this period has shown an open and flexible approach towards evidence. The procedure was up to the tribunals to determine.

#### 4.1.2 The Two Hague Conventions:

This era was marked by the creation of the 1899 Convention for the Pacific Settlement of International Disputes. The Convention was arguably not as complex or detailed as modern treaties. However, it does give an indication of the nature of evidential rules at the time.

The Convention established the Permanent Court of Arbitration which was essentially a list of arbitrators chosen by the member States, anyone of whom could be called in case of a dispute. However, the Convention did not go into detail on the rules of evidence, but granted wide powers to the arbitrators. “The Tribunal has the right to issue Rules of Procedure...and to arrange all the formalities required for dealing with the evidence”<sup>105</sup>.

The 1907 Convention for the Pacific Settlement of International Disputes was an improvement of the 1899 Convention. It was more extensive and detailed. However, the 1907 Convention did not add much regarding evidential rules. It was left to the Tribunal to decide the rules of procedure<sup>106</sup>. As a confirmation of the Convention’s liberal approach, the International Commission of Inquiry, a new body set up by the Convention, was left to “...arrange all the formalities required for dealing with the evidence”<sup>107</sup>.

The cases of this period also reflected the flexible approach mentioned in the two Hague Conventions, illustrated by the examples below.

In an arbitral award made by the Swiss Federal Council in a boundary dispute between French Guiana and Brazil, it was declared, referring to the French objection

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<sup>104</sup> See further: Sandifer, (1975) 38

<sup>105</sup> *The 1899 Hague Convention*, 1899, Art. 49

<sup>106</sup> *The 1907 Hague Convention*, 1907, Art. 74.

<sup>107</sup> *The 1907 Hague Convention*, 1907, Art. 18. Very few rules of evidence were introduced. However, some rules were introduced, such as in Article 23, where if the witnesses or experts are unable to appear before the Commission, then the Parties will arrange for their testimonies to be taken in their own country. See also: Art. 26, 27, 28, 32.

to the introduction of new evidence by Brazil with its second memoir: “L’arbitre estime qu’il n’est pas réduit à s’en tenir aux allegations des parties et aux moyens de preuve qu’elles invoquent. Il ne s’agit pas, pour lui, de trancher un différend de droit civil, selon les voies de la procédure civile mais d’établir un fait historique ; il doit rechercher la vérité par tous les moyens qui sont à sa disposition. Il ne tiendra compte des allégations des parties et des documents produits, sur lesquels la partie adverse n’aura pas pu s’expliquer, que si leur exactitude de leur authenticité lui paraissent hors de doute.”<sup>108</sup> In other words, the arbitral tribunal was adopting an open and flexible approach toward evidence.

This approach was again reflected in the *Whaling and Sealing Claims*. In this case between the United States and Russia, when Counsel for the United States was protesting against the introduction of a deposition by an expert who was not present, the Arbitrator said: “In an arbitration between States it is of far greater interest than in purely juridical proceedings to draw forth all evidence, whether direct or indirect, which may serve to give full light”<sup>109</sup>.

Another clear example of the liberal approach international tribunals took towards rules of evidence can be seen in the *Franqui Case* before the Spanish-Venezuelan Mixed Claims Commission of 1903. In this case, Umpire Gutierrez-Otero said, “The Arbitral tribunal remains free to employ, for enlightening itself, all the kinds of evidence that it deems necessary; and it will not be bound, in this regard, by any restrictions that are encountered in municipal law...”<sup>110</sup>

Further, the War Claims Arbiter, appointed by the President of the United States under the Settlement of War Claims Act of 1928, in discussing the value of patents in one country when issued in another, said: “The Arbiter’s rules governing the admissibility of evidence are not technical but are most liberal in the interest of arriving at the truth whatsoever form it may take, and where the claimant proffers evidence tending to establish the value in foreign countries of the patented invention, together with evidence of the conditions existing there as compared with those existing in the United States at the pertinent time, such evidence will be admitted for what it may be worth, and the weight to which it may entitle will be determined by the Arbiter.”<sup>111</sup>

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<sup>108</sup> *French Guiana-Brazil Boundary Arbitration*, Arbitral Tribunal (Swiss Federal Council), 1900

<sup>109</sup> *Whaling and Sealing Claims*, Arbitral Tribunal, 1900, 428 [1902]

<sup>110</sup> Merignhac, (1895) 269

<sup>111</sup> *War Claims Arbiter*, War Claims Arbiter, 1928, 61-62. See further: Sandifer, (1975) 6-7

Another example of the open approach was in the *Venezuela Preferential Case*. In this case between Germany and Venezuela, the Arbitral agreement accorded broad discretion to the tribunal. In Article 2 of the Agreement, it was provided: “The facts on which shall depend the decision of the questions stated in Article 1 shall be ascertained in such a manner as the tribunal may determine.”<sup>112</sup>

From the few provisions and the examples of the cases of this period, it can be seen that international tribunals, like those in the period before it, adopted a flexible and open approach towards evidential rules. In this era, there were attempts to formalize to an extent this procedure but much discretion was still left to the tribunals.

#### 4.1.3 The Years of the Permanent Court:

During this period, permanent courts such as the CACJ and the PCIJ began to play a bigger role. In contrast to the arbitral tribunals before them, their rules, even though few, were not *ad hoc* but fixed and set out in the relevant provisions of the tribunals. This new characteristic of evidential rules was duly noted by Lauterpacht: “Apart from the rules of permanent tribunals like the Permanent Court of Arbitration or the Permanent Court of International Justice, no specific rules as to evidence and proof have so far evolved in international arbitration.”<sup>113</sup> The rules in these permanent tribunals tend to be more specific and detailed. However, much flexibility was still left to them.

##### 4.1.3.1 The Central American Court of Justice:

The CACJ established an approach leaving evidential rules to the parties to decide. There was very little said on evidential rules in the provisions<sup>114</sup>. In the Convention establishing the Court, the provisions relating to evidence were those regarding the rules regulating the pleadings<sup>115</sup>. In its Regulations, very little was mentioned with regard to evidential rules. “The extent of the powers of the court, as

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<sup>112</sup> *Venezuela Preferential Case*, Arbitral Tribunal, 1903, 63. See further: Sandifer, (1975) 37

<sup>113</sup> Lauterpacht, (1931) 42

<sup>114</sup> There were a few general rules. For example, in these two cases regarding the submission of complaints (Article XIV of the Convention), it was ruled that they have to be filed with the relevant documents to be accepted by the Court. See: *Honduras and Nicaragua v. Guatemala and El Salvador*, CACJ, 1908, 8-9, 177; *Felipe Molina Larios v. Honduras*, CACJ, 1913, 60-61. See further : Sandifer, (1975) 185-187

<sup>115</sup> See the text of Articles XIV, XV, XVI in *Convention for the Establishment of a Central American Court of Justice*, 1907, Vol. 2. See further: Sandifer, (1975) 39

well as the judicial procedure applicable, shall be those expressed by the agreement or *compromis* of the parties...”<sup>116</sup> The ability of the parties to decide on the evidential rules indicates that, among attempts to formalise them<sup>117</sup>, tribunals granted much flexibility to States on this issue.

#### 4.1.3.2 The Permanent Court of International Justice:

In the Statute of the Permanent Court, little is said regarding rules of evidence, leaving much discretion to the Court. This section will give a few examples of provisions and cases from the history of the Court.

Article 30 of the Statute stipulates that “the Court shall frame rules for carrying out its functions. In particular it shall lay down rules of procedure.” In the Rules of the Court, there were also rules to which the parties had to adhere, but they were by no means complete. They were not very restrictive, very basic, and mostly concern the way in which the Parties must prepare and present the evidence, and not what evidence could be admitted<sup>118</sup>. For example, some rules of the Court concerning evidence included: a) the Court had the power to “determine whether the parties shall address the Court before or after the production of evidence”<sup>119</sup>, b) after the Court has received the evidence within the time specified, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents<sup>120</sup>, c) the power of the Court to procure evidence<sup>121</sup>.

The open approach to the admissions of evidence has been confirmed by judges of the Court. Judge Anzilotti has stated, during the drafting of the Rules in 1922, that “the Court had accepted the principle that any evidence produced by the parties should be admitted automatically”<sup>122</sup>. In a memorandum about the revision of the Rules of the Court, M. Huber said that since the Statute of the Court did “not contain a trace of a formal and rigid system of evidence, it would be inadmissible for the Court to create such a regime through its rules”. He continued: “The attitude taken by the Court in the *Mavrommatis Case* seems thus absolutely to conform to the

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<sup>116</sup> *Regulations of the Central American Court of Justice*, 1911

<sup>117</sup> The Convention of the CACJ can be distinguished from the Hague Conventions because, unlike the latter two, it was not an attempt to formalize procedural rules, including those on evidence. The Hague Conventions were more elaborate.

<sup>118</sup> E.g Article 32, 49, 50, 53, 54, 58, 60, 62, 72(3).

<sup>119</sup> Article 50 of 1936 Rules of the Court.

<sup>120</sup> Article 52 of the 1936 Rules of the Court

<sup>121</sup> Article 44, 48 of the 1936 Rules of the Court

<sup>122</sup> [1922] PCIJ., ser. D, No. 2, at 210.

exigencies of the jurisdiction exercised by it: the Parties may present any proof that they judge useful, and the Court is entirely free to take the evidence into account to the extent that it deems it pertinent.”<sup>123</sup>

Judge Van Eysinga in the *Oscar Chinn Case* stated “the Court [PCIJ] is not tied to any system of taking of evidence...its task is to cooperate in the objective ascertainment of the truth”<sup>124</sup>. The PCIJ further reaffirmed this in a session on June 28, 1926 when M. Huber, the President, commented that “it would be somewhat dangerous to adopt too rigid a rule” to the Registrar’s proposal to add the words “and no more documents may be filed by the parties except at the request of the Court” to Article 41<sup>125</sup>.

In the *Free Zones of Upper Savoy and the District of Gex Case*, overruling the demand of the Swiss Government that the Court reject the late submissions of the French Government in the oral proceedings, the Court said that “the decision of an international dispute of the present order should not mainly depend on a point of procedure”<sup>126</sup>. This further confirmed the open approach of the Court, admitting as much evidence as possible.

However, in contrast to what was stated above, there were also few instances where evidence was refused by the PCIJ. The *Free Zones Case* and the *Mavrommatis Jerusalem Concessions Case* are particularly of note<sup>127</sup>. The basis of the refusals was on the due form in which the evidence had to be submitted.

#### 4.1.4 The Introduction of the International Court of Justice:

This section, through a selection of examples of the ICJ’s cases, shows that the open approach to evidence has been carried through to this period of international litigation. A similar rationale to that of the PCIJ was shown in the *South-West Africa Cases*. In this case, the Court, in rejecting a request of the Applicant that the Respondent submit dispositions or statements *in lieu* of personal testimony by witnesses, stated: “in the view of the Court, the Statute and Rules contemplated a right

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<sup>123</sup> [1926] PCIJ, ser. D, No. 2 (add), at 249, 250. It has been suggested that the standard that was mentioned by Huber has similar characteristics as what is called “*preuve libre*” in French law. Under such a notion, the “judge shall be charged with determining the value of the means invoked by the parties, but all the means which they consider effective for establishing the correctness of their allegations may be presented to him. In other words the parties find themselves under the regime of *preuve libre* (free proof)”, Colin and Capitant, (1947) 97

<sup>124</sup> Alford, (1958) 80-81

<sup>125</sup> [1936] PCIJ, ser D, No. 1

<sup>126</sup> [1932] PCIJ ser. A/B, No. 46, at 155-56.

<sup>127</sup> See further : Sandifer, (1975) 189

of the party in contentious proceedings to produce all evidence before the Court by the calling of witnesses and experts, and a party must be left to exercise that right, as it thought fit, subject, of course, to the provisions of the Court's Statute and Rules"<sup>128</sup>. This shows that the Court had as its priority the right of the parties to present evidence the way they wanted. In the same case, Judge Jessup said that "it would seem to be a truism that in an international court which is not bound by technical rules of procedure or evidence, the meaning of submissions should be sought in the intention of the party submitting them".<sup>129</sup>

The open approach of the Court on evidential rules was reiterated in the *Interhandel Case* by Switzerland. It argued in its Memorial that it is a "principle already developed in the jurisprudence of the International Court of Justice...that the Court is free to appreciate the evidence and the allegations of the Parties. The Parties are thus in a large measure free to present any evidence that they consider necessary and opportune."<sup>130</sup>

In addition, in the *Barcelona Traction Case*, Judge Fitzmaurice pointed out that international tribunals are not firmly tied down by rules: "Of course the Trust Deeds would, if produced, constitute what is known in Common Law parlance as the "best" evidence, and unless they could be shown to have been lost or destroyed, it is unlikely that a municipal court would admit secondary evidence of their contents. International tribunals are not tied by such firm rules, however, many of which are not appropriate to litigation between the governments."<sup>131</sup>

The approach of the Court has been addressed and summarized by Rosenne: "The Court's function in establishing the facts consists in its assessing the weight of the evidence produced insofar as necessary for the determination of the concrete issue which it finds to be the one on which it has to decide. For this reason, there is little to be found in the way of rules of evidence, and a striking feature of the jurisprudence is the ability of the Court frequently to base its decision on undisputed facts, and in reducing voluminous evidence to manageable proportions."<sup>132</sup>

#### 4.1.5 Proliferation Period:

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<sup>128</sup> *South West Africa Cases (Merits)*, ICJ, 1966 32<sup>nd</sup> Public Hearing, May 14, 1965, 8 Pleadings 42; 9 id. 122-123

<sup>129</sup> *South West Africa Cases (Merits)*, ICJ, 1966, 430

<sup>130</sup> *Interhandel Case*, ICJ, 1959 ICJ Pleadings 127-28

<sup>131</sup> *Barcelona Traction Case*, ICJ, 1970, 98

<sup>132</sup> Rosenne, (1965) 580, Vol 2

A brief introduction to the approach of the many different tribunals that exist today would be difficult to achieve in this section. However, it is of note that, in this period, States have the choice to use any forum that has been previously created. These include the permanent tribunals suggested above, and also *ad hoc* arbitral tribunals. The evidential rules for these *ad hoc* tribunals are up to the parties to determine. There is currently no predominant model of evidential rules for States to use under such circumstances<sup>133</sup>.

The task of examining selected areas of evidential rules in selected tribunals will be carried out in detail in the following chapters. The proliferation of international tribunals raises questions regarding evidential rules.

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<sup>133</sup> The most established model of rules for *ad hoc* arbitration is probably the UNCITRAL rules (1976), drafted for trade disputes. However, the rules concerning evidence are not detailed.



## Chapter Three: Understanding international rules from the municipal rules.

### Section 1: Introduction

This chapter will examine evidential rules in the municipal context including different approaches of different legal traditions as well as their history, development, and jurisprudence. Studying municipal rules could help the understanding of international tribunals. The study will also show, if it is the case, why different approaches have been adopted by different jurisdictions. There are also questions as to whether international tribunals have incorporated municipal rules or used rationales of municipal rules in their own approach<sup>1</sup>. Due to limited resources, this chapter will only give an introduction to municipal rules on evidence and will not go into every detail<sup>2</sup>.

### Section 2: What is the law of evidence?

First, the chapter will examine some jurisprudential thoughts on the law of evidence. The question has been much debated in the domestic context<sup>3</sup> and written about by many scholars<sup>4</sup>.

#### 2.1 The approach of Jeremy Bentham, the freedom of proof:

Bentham has argued that the ultimate goal for evidential rules is to achieve “rectitude in the dispute” between the two parties. He suggested that this can be achieved through the Natural System of Procedure<sup>5</sup>, or the “Freedom of Proof”, which means the minimal use, and when possible, the absence of technical rules, in particular those rules which exclude evidence, and those which specify its probative value<sup>6</sup>. The rules that exist should be a guide, and not a restriction. “In other words,

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<sup>1</sup> See Chapter 7, Section 3.11, 264, for the effects of municipal evidential rules at the international level.

<sup>2</sup> The section will address the Common, Civil and Islamic Law tradition. A brief account of the Socialist Law tradition and examples of evidential rules in the municipal context are included in Appendix C.

<sup>3</sup> This section focuses on the Common law tradition and the Civil law tradition.

<sup>4</sup> Some of these scholars include: a) Gilbert, who attempted to put all the rules of evidence under one principle; b) Bentham who argued for the non-binding nature of rules in his Natural System of Procedure; c) Stephen, who tried to find coherence in the law of evidence with the notion of relevancy and; d) Thayer who treated the “rules of evidence as a mixed group of exceptions to a principle of freedom of proof”. See further: Twining, (1990a), Chapter 6. See also: Thayer, (1898) 314.

<sup>5</sup> Bentham, (1827), Vol 2, 425-434, Vol. 4, 5-12, 428 *et seq.* See further: Twining, (1985), Chapter 2; and Postema, (1986), Chapter 10 *et seq.*

<sup>6</sup> Dennis, (2002) 25

the law should not attempt to control fact-finding by having rules dictating what evidence can be received and how it should be evaluated. Instead the law should aim to improve the quality and accuracy of fact-finding by educating the fact-finder about the factors affecting the relevance and weight of evidence, and by giving guidance as to appropriate reasoning in the evaluation of evidence.”<sup>7</sup>

Nonetheless, Bentham recognized that there are limitations in every judicial system and allowed for modification to his Natural System approach by permitting exceptions to the general rule. Along the lines of his utilitarian approach, the process involves the balancing of costs. In other words, if the benefits gained from the receipt of the evidence were outweighed by other considerations (e.g. vexation, expense, delays), the omission of the evidence would be justified<sup>8</sup>. Below are factors which the court may consider as restrictions to the Freedom of Proof:

#### 2.1.1 Expense and Delay:

Most judicial systems recognize the goals of dealing with disputes: a) in a timely manner, b) in the most cost effective way. There is a balance to be made between admitting as much evidence as possible and dealing with the dispute in the most efficient way. The admission of evidence always requires time and money. For example, resources could be spent on the hearing of evidence in the proceedings. The admission of irrelevant evidence would be a waste of resources.

#### 2.1.2 Procedural Fairness:

“There seems to be broad agreement that the law of evidence should aim to promote minimum standards of procedural fairness... [Procedural fairness] comprise[s] the ideas that parties to adjudication should have adequate notice of the allegations of their opponents, a reasonable opportunity to present their own case..., and that the adjudication should be conducted in public in an orderly and impartial manner.”<sup>9</sup>

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<sup>7</sup> Dennis, (2002) 25

<sup>8</sup> Twining has pointed to the fact that the term “vexation, expense, delays” used by Bentham has never been defined by him, leaving the notion unclear. Twining, (1985) 91-94

<sup>9</sup> Dennis, (2002) 26

However, it has been argued that procedural fairness is not actually a constraint on the freedom of proof, but seems to be compatible with it<sup>10</sup>. Promoting procedural fairness does not necessarily mean the reduction of the amount of evidence admitted. In fact, promoting procedural fairness could help the maximization of the admission of evidence because participation of the parties is encouraged.

Procedural fairness also has a role in legitimizing the decision of any tribunal, both from the perspective of the participating parties and the public. When the decisions are seen to be fair, parties are more likely to conform to them. This is particularly important in international litigation where there are few enforcement mechanisms. A respected system will be used by States. Justice must not only be done but seen to be done.

#### 2.1.3 Avoidance of Error:

The third factor which could be a constraint on the Freedom of Proof is the avoidance of error. The nature of judicial proceedings and imperfect evidence can lead to error and consequently a possible miscarriage of justice.

Scholars have put forward that “an important aim of the law of evidence is to allocate the risks of error in the adjudicative process so as to minimise the chance of a miscarriage of justice.”<sup>11</sup> Examples of such rules include the burden of proof and the standard of proof. These aspects of evidential rules can be varied by placing the burden of proof on different parties or setting a higher or lower standard of proof. They can change depending on the relationship between the importance of the issue at stake and the gravity of a possible miscarriage of justice. For example, the standard of proof can be set higher in criminal cases to reduce the risk of a wrongful conviction<sup>12</sup>.

#### 2.1.4 Other factors:

Judicial systems can also consider other factors as possible restraints on the application of the Freedom of Proof. The court can take into account what it

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<sup>10</sup> Dennis, (2002) 26-27

<sup>11</sup> Dennis, (2002) 27. See further: Australian Law Reform Commission, (1987) paras 35 *et seq*; Stein, (1996) 279. Stein argues that allocation the risk of error is the prime principle of the law of evidence.

<sup>12</sup> Dennis, (2002) 27

considers as the ultimate goal of the rules of evidence gearing the rules towards achieving it. These will be addressed in the next section.

In addition, other factors which could play a role in determining the court's approach on evidence include: a) considerations concerning the security of the State<sup>13</sup>, b) the protection of family relationships and, c) the curbing of coercive methods of interrogation<sup>14</sup>.

## 2.2 The aim of the law of evidence

### 2.2.1 Search for the truth:

One of the roles of the law evidence is the search for the truth. "The ultimate purpose of the law of evidence today is to ensure that the facts found, to which the court is to apply the rules of substantive law, are more likely to be true than false"<sup>15</sup>.

However, it must be noted that evidence is imperfect as illustrated by a case before the UK House of Lords, *Air Canada v. Secretary of State for Trade*. In this case, Lord Wilberforce said: "It often happens, from the imperfection of evidence, or the withholding of it, sometimes by the party in whose favour it would tell if presented, that an adjudication has to be made which is not, and is known not to be, the whole truth of the matter; yet, if the decision has been in accordance with the available evidence and with the law, justice will have been fairly done."<sup>16</sup>

### 2.2.2 The rights of individuals:

Some scholars have argued that the rights of individuals should be considered as an aim of the law of evidence. This right entails legal protection from the State, and not to be freely jeopardized for generalised social goals<sup>17</sup>. The determination of the right will depend on the legal tradition and social norm of each State. Examples of such rights under the domestic context are: a) the right of the accused not to be wrongly convicted, b) the right of an individual to a fair hearing and trial. Rawls

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<sup>13</sup> More clearly seen in the Socialist legal traditions, see Appendix C.

<sup>14</sup> Twining, (1990b), 73

<sup>15</sup> Stone and Wells, (1991) 59

<sup>16</sup> *Air Canada v. Secretary of State for Trade*, House of Lords, 1983, 438

<sup>17</sup> See further: Dworkin, (1977)

argues that judgments that affect the rights of individuals must be made according to procedures which respect their autonomy<sup>18</sup>.

However, there are also limitations in discussing the rights of individuals as an aim for the law of evidence. It is more applicable to criminal law where the rights are better defined than in the civil law context. Further, in the case of international law, it must be noted that States and individuals are different. The rights they enjoy cannot be identical. Unlike the rights of individuals which might be laid out in a constitution or Bill of Rights, the rights of States are not clearly set out. States enjoy certain rights within the international community such as State sovereignty but the existing definition is not aimed at providing a safeguard against procedural uncertainty in international litigation. This begs the question of whether it is possible to apply the notion of rights of individuals *mutatis mutandis* to States.

Further, States have to claim their rights. States can have differing perspectives on what they regard as their right, and their views can shift depending on the government in power or their international lawyers at the time. There is no authority at the international level determining the rights of each State.

### 2.2.2 Legitimacy:

The last aim of evidential rules addressed by this chapter is the legitimacy of the judicial system. Adjudication must have, and be seen to have, legitimacy in order to gain recognition. Dennis notes: "Legitimacy of decision is not the same concept as (factual) rectitude of decision, although the two are closely related...The argument will be developed that the aims of the law of evidence are ultimately referable to an overall objective of promoting legitimacy of decision in adjudication, and that priorities as between competing rights and interests should be settled according to how best legitimacy of decision will be promoted."<sup>19</sup> Legitimacy includes the concept of integrity and acceptability of the courts. Courts may need to exclude some reliable evidence if there is a risk that the admission may impair the authority of the verdict.

Accordingly, the notion of legitimacy depends on the social context of the State and the type of dispute before the court. To gain legitimacy, litigation must be

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<sup>18</sup> Rawls, (1972) 238-239

<sup>19</sup> Dennis, (2002) 41 see also 41-49

carried out in public. This is particularly of note in international litigation where many cases are carried out in private<sup>20</sup>.

Taking examples from municipal law, and mainly criminal law, many evidential rules are geared towards establishing legitimacy:

(a) The burden of proof placed on the prosecution to prove the guilt of the accused illustrates that the freedom and the dignity of the accused is respected.

(b) The refusal to accept evidence obtained through torture because it is against the general moral standard.

Dennis suggests that the factual accuracy of the decision becomes secondary to establishing the legitimacy of the verdict<sup>21</sup>. A doubtful conviction can never be legitimate, but, an accurate conviction may be illegitimate if the method used in reaching that verdict is against minimum social values. But more than often, an accurate decision leads to legitimacy.

### 2.3 The application of the factors affecting evidential rules:

Having examined the constraints on the freedom of proof, the more difficult question is the determination of the extent and how they should be applied. Courts have to find a balance between many objectives, determining what priority it will give to each factor listed above.

One way is to weigh them against one another and calculate the gains and losses. The approach is valid, but there exists a problem that stems from the fact that the values to be weight up are difficult to gauge<sup>22</sup>. For example, how can a concept like State security be “weight in the same currency” as the accuracy of adjudicative process<sup>23</sup>? The term “balancing” should reflect a complex process of seeking the rights, interests and pertinent considerations. In addition, it should be “a properly researched, reasoned, and principled course of argument”<sup>24</sup>. However, Ashworth has argued that the act of balancing is no more than a device for reaching the desired conclusion of the court without any proper argument<sup>25</sup>.

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<sup>20</sup> Cases before *ad hoc* tribunals are normally private, but cases before permanent tribunals are normally public.

<sup>21</sup> Dennis, (2002) 45

<sup>22</sup> Dennis, (2002) 29-30

<sup>23</sup> Dennis, (2002) 29

<sup>24</sup> Dennis, (2002) 29

<sup>25</sup> Ashworth, (1998) 30-31

## 2.4 Preliminary Conclusion:

This section has looked at the question of what is the law of evidence and what might the court take into consideration in deciding its approach. Although this section has segregated the different influencing factors, in practice, the court would probably take all of them into consideration resulting in a balance and a mixture of some if not all the factors. Further, courts in each jurisdiction will balance and prioritise each consideration differently depending on what their policies are.

## Section 3: The Common Law Tradition:

### 3.1 Historical aspects and characteristics of the Common Law system:

The nature of evidential rules in the Common Law jurisdictions has been greatly influenced by the adversarial nature of the system. Twining, reformulating Jacob's words, summarises the key aspects of English civil procedure<sup>26</sup>. They include principles of: a) party autonomy, b) the Court as umpire, c) orality, d) publicity, e) the protection of the accused against mistaken conviction. This adversarial process is unlikely to lead to an inquiry.

The study of the evidential rules of the Common Law tradition can be roughly divided into 4 periods: a) Pre-1800, b) 1800-50, dominated by thoughts of Bentham, c) 1850-1900, when reforms took place in England, India and the United States, d) 1900-1960, dominated by Wigmore<sup>27</sup>.

In the context of the English system, it must be noted at the outset that there were two judicial systems running parallel in its early stages of development: Common law<sup>28</sup> and Equity<sup>29</sup>. Early equity procedure resembled the *jus commune* on the Continent<sup>30</sup>. They included "the predominance of writing, the secret and segmented taking of evidence by examiners of commissioners, the numerical

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<sup>26</sup> Twining, (1990a) 182-184

<sup>27</sup> See further: Stone and Wells, (1991) Part One, Cappelletti and Garth, (1987) Chapter 1

<sup>28</sup> Not to be confused with the "common law" as distinguished from "civil law", i.e. the two main legal traditions of the world.

<sup>29</sup> See further: Holdsworth, (1972). Equity cases were brought before the Chancellor.

<sup>30</sup> See Chapter 4, Section 4, 95-103

evaluation of evidence, and extensive delay”<sup>31</sup>. In contrast to early equity procedures, the common law procedures focused on oral evidence<sup>32</sup>.

When common law and equity merged, more characteristics of the former prevailed, but some of the latter also survived. The evaluation of the evidence by the jury was generally not restricted, but also not without any restrictions. Rules were developed to prevent types of evidence from being submitted to the jury, for example, the hearsay rule<sup>33</sup>.

The English system was an “accusative system of trial by jury, and a qualitative system of evidence...in which, though many types of evidence were excluded, the weight attributed to that which was admitted was not mechanically fixed, but submitted...to the judgment of a group of lay men”<sup>34</sup>.

Scholars have also suggested that development of the Common Law could be distinguished into two parts, the first regarding written documents, and the second regarding oral testimony. This distinction exists because of the difference in the nature of the evidence. Written documents have played an important role from the start of the history of the legal tradition. This has meant that there was a need for the regulations of these rules. In contrast, it has been argued that the need for rules on oral evidence only arose “when it became established that the jury must give its verdict only on the evidence of witnesses duly sworn in the cause”<sup>35</sup>. This is consequently the explanation for the two distinctive set of rules for written and oral evidence<sup>36</sup>.

### 3.2 Developments in England and the United States:

Important reforms started in England in 1830 and carried on into the middle of the 19<sup>th</sup> century, addressing similar problems as those in the Civil Law systems. Bentham’s school of thought was against the formalistic, restrictive and exclusionary nature of evidential rules. With his treatise published around 1820, Bentham greatly influenced the development of the law of evidence in the Common Law tradition.

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<sup>31</sup> Cappelletti and Garth, (1987) 10, Chapter 1

<sup>32</sup> Cappelletti and Garth, (1987) 10, Chapter 1

<sup>33</sup> Some rules were developed from the fear of an overreaching judiciary and the incompetence of juries.

<sup>34</sup> Stone and Wells, (1991) 29. This is to be contrasted with the Civil Law tradition in the next section.

<sup>35</sup> Stone and Wells, (1991) 23

<sup>36</sup> See further: Stone and Wells, (1991) 23-36



The reform in England started sooner than on the Continent, with acts such as *Lord Denman's Act* of 1843 and the *County Court Act* of 1846. During the reform of the *Judicial Acts* of 1873-1875, the Benthamite lead movement brought an end to features of the Common Law resembling the Continental system<sup>37</sup>. For example, in the Court of Chancery, a goal was set to achieve more orality and immediacy in the proceedings. A problem that existed was that the witnesses "instead of being examined in open court by hostile counsel and without time to prepare himself", was questioned in writing and thus "he had leisure to exert his cunning on the fabrication of a false and fraudulent reply, which is eventually cast into due technical form by his counsel"<sup>38</sup>.

Reforms to reduce restrictions carry on today. For example, the *Evidence Act* of 1938 puts a limitation on the "best evidence" rule allowing more secondary evidence to be presented before the court. The *Evidence Act* of 1972 further eliminated rules restricting the submission of evidence to the court<sup>39</sup>.

The evidentiary reforms in the US took place quickly after England with many states taking a similar approach. The aim was also to exclude as many restrictions as possible. There are few disqualifications and exclusionary rules left in the US today<sup>40</sup>. However, the existence of the jury prevents the system from moving towards the free evaluation of evidence<sup>41</sup>. There were also reforms in other areas of the US legal system. For example, there was the curtailment of power of the judges in many states. Some states went as far as forbidding the judge from commenting on the evidence or instructing the jury on the nature of the law except as requested by the parties. The judge's powers were restricted even up to the late 19<sup>th</sup> century. A re-assessment of his powers began in the early part of the 20<sup>th</sup> century, and development continues even in the later part of the century<sup>42</sup>.

### 3.3 The Jury in the Common Law tradition:

The jury is one key factor that distinguishes the Common Law tradition from the Civil Law tradition. Having the jury meant that it was more difficult for the

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<sup>37</sup> See further: Cappelletti and Garth, (1987) 39 and Pound and Pluncknett, (1927) 238

<sup>38</sup> Johnes, (1834) 90

<sup>39</sup> See further: Cappelletti and Garth, (1987) 40

<sup>40</sup> See further: Cappelletti and Garth, (1987) 40-41

<sup>41</sup> There were fears about the incompetent juries.

<sup>42</sup> Developments also occurred in other aspects of the legal system but the details are beyond the scope of this chapter. See generally: Cappelletti and Garth, (1987)

system to be based on written evidence or the mechanical evaluation of evidence. Historically, because jurors were more than often illiterate, the system had to be primarily oral.

In its earlier forms, the jury was chosen for their knowledge to be brought into the case. In certain ways, they were witnesses. However, the jury has changed to the current form: twelve representatives deciding the case on the basis of sworn evidence. The jury may not use information independently obtained or that not presented to it. The jury has prevented a mechanical system of evidential rules from being introduced.

Further, it has been suggested that the use of the jury in civil cases in England is on a decline during the past century and has had effects on the rules of evidence<sup>43</sup>. “Working without a jury, judges feel free to admit evidence as to which the exclusionary rules might otherwise apply, reasoning that they will be able to give due weight to such evidence”<sup>44</sup>.

### 3.4 Common Law jurisdictions today:

In both England and the United States, proceedings currently include a preparatory period and the actual trial proceedings. The former is dominated with written procedure, the later with oral ones. The proof-taking during the trial phase includes oral examination and cross-examination. Some written documents must even be transformed into statements by the witnesses or the experts. The hearings are generally quite concentrated and held in a short period of time. This form of evidence is historically linked to the notion of oaths and cross-examination, to which the tradition attaches great importance<sup>45</sup>.

One aspect that both the courts in England and the United States share is that most of their procedural rules are now prepared and promulgated by the court themselves or by agencies in which the judge plays an important role. Designating these powers away from the legislature and to the judiciary means that the court is more efficient, flexible and sensitive to issues that might not have been foreseen by

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<sup>43</sup> “It has been said that the civil courts in England today work almost without rules of evidence.” Cappelletti and Garth, (1987) 40.

<sup>44</sup> Cappelletti and Garth, (1987) 40.

<sup>45</sup> Dennis, (2002) 13

the legislature<sup>46</sup>. Although having gained much support from Continental writers, this allocation of power to the courts is yet to be implemented in Europe<sup>47</sup>. No Common Law country has completely abolished all technical rules. However, as noted by Tapper, there has been a general trend to move towards that goal<sup>48</sup>.

## Section 4: The Civil Law tradition

### 4.1 Historical aspects and characteristics of the Civil Law system:

There has been integration of Roman law and canon law in both the Common Law and the Civil Law traditions<sup>49</sup>. There is consequently a possibility that the two legal traditions could adopt similar approaches on evidential rules. However, this has not been the case.

“In no respect is the divergence of the common law and the continental systems more extraordinary than in the law of evidence.”<sup>50</sup> In Civil Law countries, rules of evidence, especially those on the admission and exclusion of evidence are not so technical. The judges are also more active in directing the proceedings and the examination of the witnesses. For example, German judges are involved in the formulation of issues on the basis of the statements of facts submitted by the parties<sup>51</sup>.

The law on the Continent is derived from Roman law which spread throughout Europe in the 12<sup>th</sup> century. The Roman system of investigation, known as the “inquisitorial procedure”<sup>52</sup>, was used by the Church courts and then the lay courts, establishing its existence throughout the Continent in the Middle Ages. This new system differed from the pre-existing one because it arrived at the truth through rational investigation. An investigation would consist of two parts: the instruction and the trial. The instruction was a preliminary examination of the circumstances of the crime, and the evidence implicating the suspected person. The trial merely involved interrogation of the accused by the judge on the basis of the files. Although

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<sup>46</sup> In both England and the United States, the legislature has retained the ability to veto the court’s rules, but this is not often used. See further: Cappelletti and Garth, (1987) 26-27

<sup>47</sup> The exception is the Italian Constitutional Court which has to power to adopt procedural rules.

<sup>48</sup> Tapper, (1985), Preface

<sup>49</sup> For further details, see: Stone and Wells, (1991) 30-32

<sup>50</sup> Stone and Wells, (1991) 29, Chapter 1

<sup>51</sup> Lewinski, (1910) 198-201

<sup>52</sup> For further details, see: Stone and Wells, (1991) 11-12, Chapter 1.

an improvement on the pre-existing one, this newly introduced system was not without flaws<sup>53</sup>.

The system on the Continent “adopted the inquisitorial system of trial by public officials, and the quantitative system of evidence, that is, one in which everything was admitted, but was allowed only a fixed weight”<sup>54</sup>.

#### 4.2 The *jus commune*:

Since the end of the Middle Ages, there has been a common approach of procedural law on the Continent, the *jus commune*, which still has influence on Continental jurisdictions today<sup>55</sup>. Historically, it has at least five important characteristics:

First, *quod non est in actis non est in mundo* (procedural acts not reduced to writing are null and void)<sup>56</sup>.

Second, direct contact and contact on a personal level was discouraged in judicial proceedings. The judge based his judgment on written records prepared in his absence. Witnesses were examined *in camera* and their testimonies were translated into the official language, often Latin.

Third, the evaluation of evidence was set in a formal framework. For example, the notion of *testis unus testis nullus* was applied, and concurring testimonies of two witnesses were binding upon the court. The value of statements made by female witnesses was less than those of men. Statements made by noblemen counted more than those of commoners. Evidence was counted and not weighed. This is understandable because the judges did not have personal contact with the witnesses, and consequently were not able to evaluate their sincerity.

Fourth, legal proceedings were in segments. The law imposed compulsory stages as a controlling measure, but at the same time having a segmentation effect. The parties had control over the proceedings since intervention from the judge was minimal.

Fifth, civil cases lasted a long time. Proceedings spanning several decades were not unheard of<sup>57</sup>.

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<sup>53</sup> See further: Stone and Wells, (1991) 13

<sup>54</sup> Stone and Wells, (1991) 29. This is to be contrasted with the Common Law system.

<sup>55</sup> Cappelletti and Garth, (1987) 5

<sup>56</sup> Further see: Cappelletti, (1971) 42-43; Engelmann, (1927) 457-458

Any contact between the judge and the parties was considered to have impairing effects on the judge's impartiality. The method of evaluation of evidence was also affected by the distrust of the judiciary. There were many restrictive rules and the judge was not able to assess the evidence freely. He was not able to weigh the proof, but just to count it. Proof was considered in arithmetical proportions. For example, the court would grant evidence full proof, half proof, one-fourth, etc. The lack of contact between the judge and the witnesses meant that the judge could not use his subjective view and experience in evaluating the evidence. He was unable to detect the hesitation, uncertainty or contradiction in the statements of the witnesses, a role performed by a judge in today's system. The remoteness between the judge and the evidence was increased by the translation of the statements into Latin.

These evidential rules were based on Thomistic-Aristotelian philosophy, which was based on several *a priori* presumptions. Examples of these are: noblemen are more likely to tell the truth than commoners because they would take care to keep their family's good name, or, a man was more capable of being relied on than a woman because he has a more certain and firmer character. Some rules were derived from theological texts. For example, the rule stating that the statement of one witness does not have any probative value derived from a Biblical notion<sup>57</sup>. Some of the presumptions of the *jus commune* have been eliminated by modern psychology but some remain. For example, courts today still consider testimonies of a number of witnesses to have more probative value than that of one witness.

In Europe generally, even up to the earlier parts of the 19<sup>th</sup> Century, litigation was more or less under the control of the parties. The judge was to consider the case according to the procedures decided by the parties. The parties even had the liberty to make arrangements on evidence so that the judge would have to base his decision on a set of facts that might be false.

#### 4.3 Reforms:

Around the 18<sup>th</sup> century, legal scholars started to question the old procedures of the *jus commune* system. Changes occurred through various European code

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<sup>57</sup> For example, see: Kern, (1954) 31, 45-46

<sup>58</sup> Deut. 19:15. See also e.g. the Gospel according to John 8:13

reforms. For example, reform took place in Austria with the Code of 1895 and in France with Code of Civil Procedure in 1806.

The reform in the Civil Law tradition had several aims, including: a) direct contact between all the participants involved in the proceedings, b) the free evaluation of evidence without the influence of *a priori* rules of evaluation or exclusion<sup>59</sup>, c) the attempt to concentrate the hearings into a shorter period, and as a consequence achieving a more efficient judicial system<sup>60</sup>.

More specifically, in France, the revolution made a start on the reform of the *jus commune* system. There were many procedural reforms allowing an evaluation of evidence that was fuller and freer. For example, the taking of testimonials in private was abolished. The examination of witnesses was to be heard by judges in public and before the parties. The pre-existing formal system of proof, based on the mechanical and numerical system of evaluation, was also abolished and replaced with the free evaluation of evidence. The proceedings involved more immediacy and the judges were given certain powers of procedural initiative, especially regarding evidence<sup>61</sup>. Changes were incorporated into the Code of Civil Procedure in 1806.

Coinciding with the French impetus for reform, other States also sought similar changes in their legal systems. There were the German Code of Civil Procedure of 1877<sup>62</sup>, and the more radical Austrian Code of 1895<sup>63</sup>. Other States on the Continent soon established their own Code of Civil Procedure, the majority of them basing it on either the German or the Austrian model: the Norwegian Code of 1915, the Danish codes of 1916 and 1979, the Swedish Code of 1942, and the Swiss Federal Law of Civil Procedure of 1947.

However, these reforms did not eliminate all aspects of the former system. For example, the French Code introduced an arrangement which did not promote immediacy between the evidentiary elements and the adjudicatory body. Although the parties were allowed to be present at the taking of the testimonies, the evidentiary hearings were conducted by a commissioned judge (*juge commis*) and not in public. Today, the person conducting the evidentiary hearing is the examining judge (*juge de*

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<sup>59</sup> The judge became an active participant in the proceedings and no longer a spectator. He was given much more power to control the trial.

<sup>60</sup> Civil procedures in Europe generally became more public.

<sup>61</sup> Cappelletti and Garth, (1987) 24, Chapter 1. This trend is still very much alive today, the recent Code reforms in France being indicative of this fact, e.g. the reform of 30 October 1935 and 15 July 1944.

<sup>62</sup> The German Code of Civil Procedure, in force 1 Oct 1879.

<sup>63</sup> The Austrian Code of Civil Procedure, in force 1 January 1898. The Austrian Code was said to be more radical because it gave the judge a more active role in the judicial proceedings, notably his ability to be in contact with the litigants on a more personal level.

*la mise en état*). He is a member of the adjudicatory panel and is able to pass on his personal impressions of the evidence to his colleagues.

Developments to enhance the immediate contact between evidentiary elements and the adjudicatory body were also slow in other Civil Law countries. Evidence in Germany, until very recently, had been taken by a single delegated judge, and not the full adjudicating panel. In some Latin American States, the system still very much resembles the *jus commune* system. Witnesses still have to testify before the *secretario* who prepares a written report which is then presented to the court.

Another element of the former system that continued into the Napoleonic Code is the so-called *reproches*, rules regarding the disqualification of witnesses to testify. A party can challenge the witness, and if successful, the witness will be disqualified from giving evidence in the proceedings<sup>64</sup>. Similar disqualification rules existed in some other Civil Law countries<sup>65</sup> while others take a different approach<sup>66</sup>.

#### 4.4 Civil Law jurisdictions today:

Many Civil Law jurisdictions today share a few features worth noting. The first is the absence of a trial. A day in court is for the uninterrupted presentation of everything that concerns the case<sup>67</sup>. In some jurisdictions, such as in France, there is no taking of evidence during the oral pleadings (*plaidoiries*). However, in other jurisdictions, the oral pleadings do include the taking of evidence<sup>68</sup>. Second, the Civil Law tradition puts particular emphasis on the use of documentary evidence<sup>69</sup>. Third, there is a limit on the power of the parties and their lawyers to bring about investigations. Examples of jurisdictions with such limited powers include Spain and Italy. There is an emphasis towards granting such powers to the judges<sup>70</sup>.

States within the Civil Law tradition can be roughly divided into three groups, based on the extent to which the evidential rules still resemble the *jus commune*, and the stage where reform has reached<sup>71</sup>. The first group includes Spain, and various

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<sup>64</sup> For example, persons who had “drunk or eaten with the party”, or the party’s servants: Code of Civil Procedure (1806) art. 284 para 2

<sup>65</sup> For example, Code of Civil Procedure art. 246 of Italy stipulate that persons with interest in the case are forbidden to testify.

<sup>66</sup> The Swiss Federal Law and the Codes of Austria of 1895, the German Code of 1877 contain nothing that would resemble the French concept of *reproches*.

<sup>67</sup> Schlesinger, (1980) 298; Merryman, (1985) 120-121. See also: Homburger, (1970)

<sup>68</sup> E.g. in Austria, Sweden and Germany. See further: Cappelletti and Garth, (1987) 9, Chapter 1

<sup>69</sup> See further: Merryman, (1985) 122-124

<sup>70</sup> E.g. in Austria, Sweden, and France. See generally: Kaplan and Clermont, (1987)

<sup>71</sup> The distinction as drawn up in Cappelletti and Garth, (1987) 8, Chapter 1.

Latin American countries. France and Italy are in the second group, and the third group comprises States from central Europe and Scandinavia, including Austria and Sweden<sup>72</sup>.

The first group of countries can be identified because of the close resemblance of its procedures to the *jus commune*. The pre-existing mechanical nature of the evaluation process still exists. The relationship between the adjudicatory body, the parties and witnesses lack immediacy. As a result, proceedings are still very long often spanning years.

The second group of States rely less on written evidence. Even though there are oral discussions of the issues, they do not include the taking of evidence (e.g. in France). The lack of importance given to oral aspects of proceedings is illustrated by the renouncing of this right by parties in Italy. If it is the case, the end result is an arrangement similar to the first group of States. Litigation in States in this second group is slow due to the lack of immediacy between the sources of evidence and the adjudicating body.

The third group of Civil Law countries have integrated oral aspects into the proceedings to a fuller extent. There is a preparatory oral stage (*mündliche Verhandlung*), where the judge can have direct contact with the parties, and the power to call them for questioning<sup>73</sup>. The main hearing is oral, public and includes the taking of evidence, unlike the previous two groups mentioned above. The hearings are also very concentrated resulting in a much shorter duration of the proceedings.

## Section 5: Islamic Law

### 5.1 Historical aspects and characteristics of the Islamic Law system:

Islamic law is a “phenomenon so different from all other forms of law...that its study is indispensable in order to appreciate adequately the full range of possible legal phenomena.”<sup>74</sup> However, relatively little has been written in English on evidential rules in the Islamic Legal tradition for civil proceedings<sup>75</sup>.

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<sup>72</sup> See further: Cappelletti and Garth, (1987) 8-9

<sup>73</sup> This is particularly seen in Sweden, but to lesser degree in Austria and Germany. Cappelletti and Garth, (1987) 9, Chapter 1.

<sup>74</sup> Schacht, (1964) 102

<sup>75</sup> There has been some literature on criminal proceedings but less on civil proceedings. See: Salama, (1981) 115-122 and Schacht, (1964) 104



Islamic law, or Shari'a', comprises many schools of thought, each establishing its own approach to evidential rules. As a result, evidential rules can vary in the different Islamic States, each approach based on the opinion of the heads of schools of thought and discourse<sup>76</sup>. Further, many Islamic countries today have moved away from the traditional Islamic approach, and have incorporated aspects of evidential rules Western in origin, especially from the Civil Law tradition. Legal systems in Islamic States are consequently a mixture of legal traditions.

## 5.2 Before the Westernization of law:

In the Islamic legal tradition, the notion of proof and evidence clearly holds an important place: "If people's claims were accepted on their face value, some persons would claim other people's blood and properties..."<sup>77</sup>

While Western law generally arose from judicial and legislative institutions generally free from religious control, Islamic law has absorbed rules from the Koran<sup>78</sup>. Evidential rules in the Islamic tradition are strict and specific but vary according to different areas of the law. During its history, it has been subject to influence from a number of sources: a) the Hellenistic administration, b) the two empires that dominated the Middle East: the Byzantine and the Persian empires and, c) the Arab culture<sup>79</sup>.

Islamic law is derived from four main sources: the Koran, the Sunna (customs sanctioned by tradition of the Prophet), ijma' (consensus of the Muslim community) and qiyas (analogical reasoning)<sup>80</sup>. Islamic Law can be distinguished from the Common Law and the Civil Law traditions by its religious and virtually unchangeable nature. "Islamic Law is a system based upon "God's commands...having an existence independent of society imposed upon society from above."<sup>81</sup> Evidential rules in Islamic Law tradition are generally strict.

To illustrate some aspects of Islamic Law, three areas of evidential rules have been selected: (a) the use of written and oral evidence, (b) the range of evidence used by the judge, (c) the evaluation of evidence.

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<sup>76</sup> For an analysis of different branches of Islamic Law, see: Schacht, (1950) 110-124

<sup>77</sup> The words of the prophet, as quoted in: Mahmassani, (1961) 168

<sup>78</sup> E.g. see the Islamic approach to witnesses in: Mahmassani, (1961) 169-176

<sup>79</sup> Lippman and McConville, (1988) 23-24.

<sup>80</sup> See further: Edge, (1996); Khadduri, (1954); and Lippman and McConville, (1988) 28-32

<sup>81</sup> Lippman and McConville, (1988) 2

### 5.2.1 The use of written and oral evidence:

According to the Muslim jurists, the principle means of taking proof was through witnesses. Testimonies were important because written documents were not widely used in the early history of Islamic law, and the majority of the population could not write. Consequently, not as much importance was attached to written evidence as to testimonies<sup>82</sup>. “It was a fundamental principle in the Hanafi School that no reliance should be placed upon writing, because “handwritings resemble one another” and because writing “falls outside the recognized methods of proof in the shrichah, namely testimony, admission and refusal to take the oath...”<sup>83</sup>. However, as time progressed and more people relied on writing, jurists began accepting written evidence as part of the legal process.

In practice, however, documents did not only play a subsidiary role. Documentary evidence was used from the very early stages of the Muslim Arab world. Administrative authorities from the seventh-eight century AD wrote down their orders and decisions. Contracts between individuals were also written<sup>84</sup>. However, the focus was still on witnesses. A written document was not considered to make proof by itself and jurists treated it as subsidiary evidence. The emphasis on witnesses was apparent for the fact that a legal act can be proven by two persons testifying that they have witnessed the act in question. “This is why all documents, be they under private seal or certified, are always signed by at least two witnesses...One can say that written proof developed only under the cover of proof established through witnesses...”<sup>85</sup> There were also criteria to determine the reliability of witnesses<sup>86</sup>.

### 5.2.2 The range of evidence used by the judge:

Islamic jurists are still divided on how the judge may reach his decision and what type of evidence he may use. In the criminal context, there is a view proposed by the Shafi'i, Hanafi, and Hanbali schools which suggests that evidence can only

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<sup>82</sup> Jurists thought that written evidence was recommended and not obligatory.

<sup>83</sup> Mahmassani, (1961) 196

<sup>84</sup> For a discussion on the history of written evidence, see: Liebesny, (1975) 244-246

<sup>85</sup> Liebesny, (1975) 248

<sup>86</sup> See further on this notion of a reliable witness: Liebesny, (1975) 248

include the testimony of witnesses<sup>87</sup>, but other forms of evidence can be used in civil cases. The second view derives from ibn Taymuyya, ibn al-Qayyin and ibn al-Ghars schools which suggests that, for all cases, evidence comprises more than just the testimony of witnesses<sup>88</sup>. The claimant must submit whatever evidence is needed.

The question of whether the judge can render a decision based on his own knowledge is also discussed amongst Islamic jurists. The Common and the Civil Law traditions require the judge to base his decision only on the evidence presented before him. In certain circumstances, the judge is required to disqualify himself if there is a conflict of interest. However, this is not a universally accepted principle among Islamic jurists. There are three different views on the issue. First, the judge is prohibited from using his own knowledge in both criminal and civil cases. Second, the judge is allowed to rule using his own knowledge in both criminal and civil cases. Third, the judge is only restrained in making a decision according to prior knowledge only in the cases of Hudud, which are crimes prescribed by the right of God<sup>89</sup>.

### 5.2.3 The evaluation of evidence:

In the Islamic Legal tradition, there are two views on the evaluation of evidence. First, the judge has no power to evaluate the evidence and must follow the witnesses' testimonies. Second, the judge can use his discretion to weigh up the evidence<sup>90</sup>, the view of most modern codes<sup>91</sup>.

### 5.3 Islamic Law jurisdictions today:

With the increase of Western influence, supplementation and displacement of the traditional Islamic law increased. By the nineteenth century, European codes were adopted and adapted by various Islamic states.

For example, in Egyptian law, documentary evidence plays an important role in the taking of evidence by the court, in contrast with traditional Islamic law, but in line with the Civil Law tradition. Official documents, private agreements and signed

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<sup>87</sup> See further: Salama, (1981) 110

<sup>88</sup> See further: Salama, (1981) 110-111

<sup>89</sup> Many Islamic jurists allow special rules for Hudud. For example, delays of the witness in bringing forward his testimony could invalidate the evidence. See further: Salama, (1981) 111-114.

<sup>90</sup> Mahmassani, (1961) 187-189

<sup>91</sup> E.g. the Lebanese Code of Civil Procedures.

letters are used, with varying degrees of probative value. “The testimony of witnesses is definitely sub-ordinate to proof through documentation”<sup>92</sup> The emphasis on witnesses, as found in Islamic Law, has been replaced by documentary evidence, e.g. in Egypt and Turkey. In the current system, written evidence is considered “one of the most important and effective methods of proof”<sup>93</sup>. “Many modern codes, including, as we have seen, the Ottoman and the Lebanese, required the presentation of such [written] evidence in important civil cases, and excluded testimony except in restricted and exceptional circumstances”<sup>94</sup>. Most modern Islamic legal systems, while accepting testimony without reservation in penal matters, reject it in civil transactions except in special circumstances. In the Lebanese Code of Civil Procedure, for instance, testimony is not considered sufficient to disprove the contents of a written document. Moreover, it is not acceptable in cases involving more than 55 Lebanese pounds<sup>95</sup> except in very restricted and exceptional circumstances<sup>96</sup>.

Other influences, predominantly from the Civil Law tradition, are also apparent. Taking Egyptian law as an example, witnesses can be introduced by both parties. However, the witnesses cannot be directly questioned by the parties and any questions must be submitted through the court. The judges may also ask questions. In practice, the presiding judge asks most of the questions.

## Section 6: Domestic rules influencing international tribunals

### 6.1 Introduction:

This section will briefly examine the question of to what extent do domestic evidential rules have an impact on international tribunals. The following chapters will address particular influences of domestic rules on international rules where appropriate.

Domestic law can influence international tribunals in many ways. First, the legal background of the delegates of the States during the drafting stages of the governing texts of the tribunals will no doubt be important. Second, if there is a lack

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<sup>92</sup> Liebesny, (1975) 265

<sup>93</sup> Mahmassani, (1961) 196-197

<sup>94</sup> Mahmassani, (1961) 197

<sup>95</sup> Lebanese Code of Civil Procedure, Articles 153 and 241.

<sup>96</sup> Lebanese Code of Civil Procedure, Article 242

of rules, the judges are able to determine the approach adopted, and their legal background will be important<sup>97</sup>.

## 6.2 The approach taken by tribunals:

Scholars have suggested that the evidential procedures before international tribunals resemble those of the Civil Law tradition. Sandifer has suggested that: “International practice in the admission of evidence has paralleled the Civil law in its freedom from technical and restrictive rules, it being considered as in that law, that the members of the tribunal were qualified to assign a proper weight to virtually any and all evidence submitted”<sup>98</sup>. He compares the arrangement before international tribunals to the German system where “rules of evidence, though not entirely lacking, are few and simple. For example, hearsay is not as such excluded. Evidential questions are approached from a non-technical point of view...The German Court is really quite free to investigate the cause before it and does exercise its power of ascertaining the truth without the regard to technical rules.”<sup>99</sup>

Writing on the rules of admission of international tribunals, and regarding influence of municipal law, Lauterpacht notes that, “there are therefore in this matter no longer two schools of thought in international law; there is one rule of international law on the subject, which as it happens, does not coincide with that which Common Law courts apply in actions brought before them”<sup>100</sup>.

The jurisprudence from the period before the existence of the three selected tribunals has generally shown that tribunals regard themselves as being free from the influence of domestic evidential rules. This was indicated in cases such as: a) the *Thomas and Sarah Ward Case*<sup>101</sup>, b) the *Faber Case*<sup>102</sup>, c) the *Parker Case*<sup>103</sup>, d) the *Cameron Case*<sup>104</sup>.

However, there have also been contrasting cases where it has been argued that the tribunal should use domestic evidential rules. First, there was a suggestion that the arbitral tribunal should adopt the evidential rules of one of the parties. The

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<sup>97</sup> See further: Twining, (1990b) 180, Chapter 6

<sup>98</sup> Sandifer, (1975) 12

<sup>99</sup> Shartel and Wolff, (1944) 884, 888

<sup>100</sup> Lauterpacht, (1931) 41

<sup>101</sup> A case before the United States-British Mixed Claims Commission of 1871. See further: Sandifer, (1975) 29-30

<sup>102</sup> A case before the German-Venezuelan Mixed Claims Commission of 1903. See further: Sandifer, (1975) 9-10, 32-33

<sup>103</sup> A case before the United States-Mexican General Claims Commission of 1923. See further: Sandifer, (1975) 30-31

<sup>104</sup> A case before the British-Mexican Claims Commission of 1926. See further: Sandifer, (1975) 31

rationale was that international tribunals were “creatures of that States that have created it”, which meant that they were in a similar position to municipal courts of those States<sup>105</sup>. In some cases, this was rejected, e.g. in the *Case of the British-Venezuelan Mixed Claims Commission*<sup>106</sup>. In few cases, the domestic evidential rules were accepted as being applicable. For example, Rule XV of the Rules of Procedure of the United States-Chilean Mixed Claims Commission of 1892 provided that as to “the competency, relevancy, and effect,” of the evidence, the rules should “be determined by the Commission with reference to the Convention under which it is created, the laws of the two nations, the public law, and these [rules of procedure].”<sup>107</sup>

Second, it has been suggested that the tribunal should adopt the evidential rules of the State where the evidence was found. However, this has never been accepted by a tribunal<sup>108</sup>.

To conclude, there is generally little influence of domestic evidential rules on tribunal tribunals in the period prior to the creation of the three selected tribunals. There were cases where tribunals have adopted the domestic rules of the litigating States, but these have been rare.

## Section 7: Concluding remarks

This chapter has examined the question of what is the law of evidence. It has shown that the court has many factors to weigh up to establish its approach. First, the court considers the ultimate goals of the law of evidence, such as the legitimacy of the court and the rights of individuals. Second, the court has to take into account more pragmatic matters such as expense and delay.

Various legal traditions of the world have adopted differing approaches on evidential rules. The rules of each tradition depended on many factors which included the nature of the legal system and the aims and policies of the judiciary. For example, the rules in the Common Law tradition are influenced by the jury. The Islamic Legal tradition is influenced by the Koran.

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<sup>105</sup> Sandifer, (1975) 28

<sup>106</sup> This was proposed by the Venezuelan Commissioner but rejected by the Umpire of the Mixed Claims Commission in 1869. He said: “That is, international judges, acting within the limits of the compromis, according to the law of nations, ... are not bound by the unilateral prescriptions of one of the parties.” See further: Lapradelle and Politis, (1957) 537-538

<sup>107</sup> Chile and United States, Convention, August 7, 1892. Minutes of Proceedings, 1894. See also: The French Spoliation Claims, Sandifer, (1975) 33 and The case of Queen, The Award of March 26, 1873, Sandifer, (1975) 33, Lapradelle and Politis, (1957) 708-709

<sup>108</sup> This was argued by the Mexican Agent in cases before The Mexican Claims Commission. See further: Feller, (1935) 260

The Common Law was greatly influenced by legal scholars of the 19<sup>th</sup> Century such as Bentham. Early procedures were relatively more restrictive. Reform took place in the 19<sup>th</sup> century to exclude as many restrictions as possible. However, the use of the jury prevented this reform from achieving the absolute Freedom of Proof. The procedures in the Common Law tradition are predominantly oral, with an emphasis on the parties presenting the evidence to the judge.

The Civil Law tradition developed from Roman law and the procedures took on characteristics of the *jus commune* system, meaning the evidence was usually in the written form. There was little interaction between the judges and the witness, and the evaluation was set in a formal framework. However, reform took place around the 18<sup>th</sup> century emphasizing, *inter alia*, the immediacy between all participants in the proceedings. The problems of the *jus commune* system were addressed to an extent, but some of its aspects are still present in today's systems. Compared to the Common Law tradition, the judge plays a much more active role.

The Islamic Legal tradition very much differs from the first two, being based on religion. There are many schools of Islam in the different Islamic States and consequently no one approach for Islamic Law. Further, in many Islamic States, the law has undergone reform incorporating aspects of the Civil Law tradition. Prior to this, Islamic Law put an emphasis on oral testimony. However, after the influence of the Civil Law tradition, many jurisdictions have taken on board characteristics such as an increase in the use of written evidence.

From the practice of international tribunals of the earlier period of international litigation, it seems that domestic evidential rules do not play a significant role in determining the approach of the tribunals. However, the following chapters, *inter alia*, will examine the extent to which domestic rules have an influence on the rules of the three selected tribunals.

## Chapter Four: The Standard of Proof

### Section 1: Introduction

#### 1.1 Introduction:

This chapter investigates a more specific aspect of evidential rules: the standard of proof. It will examine the definition of the standard of proof in international litigation and how it is used. It looks at the relevant tribunal's governing instruments, the jurisprudence<sup>1</sup> and presents information gathered from interviews of the judges of each tribunal.

The chapter takes the thesis forward by investigating whether there is an emerging commonality with regard to the standard of proof. Further, it will also try to understand why the tribunal has adopted its particular approach. The last question is whether there should be a common set of rules on the standard of proof, but the details will be left to the final chapter where all aspects of evidential rules will be looked at together.

#### 1.2 What is the standard of proof?

The standard of proof is critical to the outcome of a case. As defined by Kazazi, it is the “measure or criterion, on the basis of which the adjudicating body ultimately determines whether or not the burden of proof in a given case has been met...”<sup>2</sup> Dennis has defined the standard of proof as “the degree of probability to which facts must be proved to be true”<sup>3</sup>.

The standard of proof can depend on the nature of the case, or the jurisdiction in which the trial is taking place. Standards which are used widely in the Common Law tradition, from the highest standard to the lowest are: (a) beyond reasonable doubt, (b) balance of probabilities or preponderance of probabilities, (c) *prima facie* evidence. The Civil Law tradition focuses more on requiring the conviction of the judge. These standards will be explored further in the section about municipal law.

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<sup>1</sup> The chapter will examine the jurisprudence of the three tribunals in different ways in an attempt to best suit the forum in question. In the case of the ICJ, because of its long history, the cases will be looked at chronologically to understand its development. As for ITLOS and the WTO DSB, since they are relatively new, the issues will be examined by subject matter.

<sup>2</sup> Kazazi, (1996) 323

<sup>3</sup> Dennis, (2002) 370



Dennis further explains the reason for the existence of the range of standards: “In adjudicative proceedings truth is generally conceived to be a matter of probability; since there can be degrees of probability a question arises of what is the appropriate degree for the proceedings in question. Because of the inherent limitations of human knowledge, no party is ever required to prove facts to a standard of absolute, mathematical, certainty.”<sup>4</sup> A clear definition from international tribunals of the standard of proof required will enhance the predictability of the litigation process.

One important factor which this chapter must take into account is that, even though the standard of proof might be clearly stipulated by a tribunal, the question of whether the party has actually met the standard is still a subjective process. This very much depends on the judge, and each one could have a different opinion of what meets the standard. In some municipal jurisdictions, notably the Common Law Tradition, the standard of the “reasonable man” has been introduced as the benchmark which the parties have to satisfy. This is not the case with international tribunals. Different backgrounds and specializations of the judges will have effect on his judgment. This point has been illustrated by a prominent author with respect to international commercial arbitration: “experience shows that, even in arbitration cases, the solution of a dispute may differ depending on whether, for example, the case is tried by one single arbitrator with a common law background sitting in London or by three arbitrators of various legal backgrounds sitting in Paris”<sup>5</sup>.

## Section 2: Municipal Law:

### 2.1 Introduction:

The aim of this section is to give an introduction to the standard of proof used in selected municipal legal traditions. Most of these rules are very complex and warrant much more time than can be given here. For the purposes of this chapter, these rules have been generalised, perhaps overly done so, for the sake of simplicity. The approach of Common Law jurisdictions has been grouped as one, and the Civil Law jurisdictions as another. However, in reality, the procedures in different jurisdictions of the same legal tradition do vary.

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<sup>4</sup> Dennis, (2002) 370

<sup>5</sup> Hanotiau, (1994) 350-351

## 2.2 The Common Law tradition:

Generally, the definition of the standard of proof is easier to find in the Common Law tradition than in the Civil Law tradition. In civil cases, the standard of proof that is applied by the courts is on “the balance of probabilities” or “the preponderance of probabilities”. Denning J explained this standard of proof as: “The...degree of cogency...required to discharge a burden in a civil case...is well settled. It must carry a reasonable degree or probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: “We think it more probable that not” the burden is discharged, but, if the probabilities are equal, it is not.”<sup>6</sup> An alternative definition can be offered as: the party has to provide “superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.”<sup>7</sup>

In criminal cases, the standard used by the courts is “beyond reasonable doubt”<sup>8</sup>. This standard has been defined in the English court by Lord Denning in *Miller v. Minister of Pensions*: “It need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence “of course it is possible but not in the least probable” the case is proved beyond a reasonable doubt, but nothing short of that will suffice.”<sup>9</sup> The standard can alternatively be expressed as whether the jury is completely satisfied or whether it is sure of the guilt<sup>10</sup>.

The ways in which different standards are applied are not absolute. There have been cases in English law where courts have used the criminal standard of proof in civil cases such as those involving the issue of contempt of court<sup>11</sup>.

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<sup>6</sup> *Miller v. Minister of Pensions*, King's Bench Division, 1947, 374

<sup>7</sup> Garner, (1999) 1201

<sup>8</sup> See further: Dennis, (2002) 392-394

<sup>9</sup> Cross, (1979) 110

<sup>10</sup> *Hepworth*, Queen's Bench, 1955, 600

<sup>11</sup> See further: Dennis, (2002) 395-399

In the context of the Common Law tradition, it is also important to note that there are two types of burdens. The first type is what is commonly understood as the burden of proof, i.e. the burden of persuading the court. This is otherwise termed as the “legal burden”, the “persuasive burden”, the “probative” burden, and the “fixed burden of proof”. The second type is the “evidential burden”. “It is the obligation to adduce sufficient evidence to raise an issue for the court to consider.”<sup>12</sup> This distinction will be important in the context of the WTO as will be seen later<sup>13</sup>.

### 2.3 The Civil Law tradition:

In the Civil Law tradition, the standard of proof is defined less clearly than in the Common Law tradition. Generally, the test used is the conviction of the judge.

In civil proceedings, an example of the standard applied is stipulated in the French *Code du travail*<sup>14</sup>: “le juge forme sa conviction au vu des elements qui lui sont fournis pas les parties et au besoin après toutes mesure d’instruction qu’il estime utile”<sup>15</sup>. Equally, in the civil code, with regard to divorce: “Le juge homologue la convention et prononce le divorce s’il a acquis la conviction que la volonté de chacun des époux est réelle et que leur consentement est libre et éclairé.”<sup>16</sup>

It has been suggested by some scholars that this standard is theoretically higher than the Common Law standard. “Continental laws seem to establish a much higher standard. The laws and the legal doctrine refer to the “inner conviction of the judge”<sup>17</sup>. Austrian law even uses the term “full conviction” (volle Überzeugung)<sup>18</sup>. But in spite of the different wording the practical result seems to be the same in both systems...”<sup>19</sup>

However, there have also been suggestions that the standard applied in the Civil Law tradition resembles the Common Law notion of preponderance of evidence. It has been argued that because “judicial proof is administered in a conflictual context: the judge is faced with divergent or contradictory proofs. Therefore, to satisfy the burden of proof is to establish sufficient likelihood to convince the judge

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<sup>12</sup> See: Dennis, (2002) 371-374 and Witenberg, (1951) 324

<sup>13</sup> See: Chapter 4, Section 5, 105

<sup>14</sup> Article L 122-14-3

<sup>15</sup> La loi du 13 juillet 1973

<sup>16</sup> Code Civil, Article 232.

<sup>17</sup> Faching, (1990) 33

<sup>18</sup> Faching, (1990) 33

<sup>19</sup> See further: Reiner, (1994) 335

who will then turn to the other party and will give him the possibility to establish a contrary likelihood. In a complex case, judges most often will try to determine what is the most probable or likely solution.”<sup>20</sup>

With regard to the criminal procedures, the French Criminal Procedural Code states that the jury needs to follow their conscience, with their “intime conviction” as to the guilt of the defendant<sup>21</sup>.

#### 2.4 Islamic Legal Tradition:

As previously mentioned, Islamic law, or Shari’a’, comprises many schools of thoughts which can establish many approaches to evidential rules in many different jurisdictions. In addition, many Islamic States have moved away from traditional Islamic law and incorporated many aspects of western legal traditions, especially the Civil Law tradition.

Traditional Islamic law puts emphasis on oral evidence and witnesses without much reliance on written evidence. In fact, “Islamic law...limits the evidence admissible at trial to three types that are thought to possess a high degree of reliability: eyewitness testimony, confessions and religious oaths”<sup>22</sup>. The reliance on oral evidence can also be seen in the rules regarding the standard of proof.

Failing a confession or admission by the defendant, an act can be proven by two persons who will testify that they have witnessed the act in question. This basis for the standard of proof is extended to the recently introduced use of written documents requiring all documents to be always signed by at least by two witnesses. Witnesses are usually male.

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<sup>20</sup> Hanotiau, (1994) 345-346

<sup>21</sup> Code de Procedure Penale, Art 304.

<sup>22</sup> Lippman and McConville, (1988) 68

## International tribunals: ICJ, ITLOS, and WTO DSB

### Section 3: ICJ:

#### 3.1 Introduction:

The issue of the standard of proof of the Court is important and very much alive today. In this section, its jurisprudence will be examined. For the purposes of this study, the history of the Court has been divided into 3 periods: (a) 1945-1965, (b) 1965-1985, (c) 1985-2005. In addition, a selection of the jurisprudence prior to the creation of the Court will also be looked at, putting the practice of the Court in context. The suggested time divisions do not reflect the conduct of the Court in any way, but so that the jurisprudence can be dealt with more easily.

This section will incorporate as much of the existing literature on the standard of proof as possible. However, it must be noted from the outset that this is limited, especially in the context of the ICJ and ITLOS.

#### 3.2 The History of the Court:

##### 3.2.1 Pre-1945:

The International Court of Justice was created in 1945, by no means at the beginning of the history of international litigation. To understand the context in which the Court was created, this section will examine jurisprudence prior to its creation. However, the jurisprudence of the period is vast and cannot be fully covered by this chapter alone. This section will consequently deal with relevant cases of the PCIJ and some of other fora, but both at a simplified level.

##### 3.2.1.1 PCIJ:

Although not a direct replacement of the PCIJ, the ICJ resembles the PCIJ in both its characteristics and the rules that govern it. The details of the relationship between the two Courts have been examined in a previous chapter<sup>23</sup>.

The PCIJ was created in 1922 after the First World War. There has been a substantial amount of literature on the PCIJ, stretching to its procedural rules and evidential rules<sup>24</sup>. However, it has not addressed the issue of the standard of proof in great detail. During the period of the PCIJ, the issue of the standard of proof was not considered to be of great importance. This is indicated by Ralston. He has said that the insufficiency of evidence in international litigation that is due to the weighing of facts (i.e. not satisfying the standard of proof) “offer nothing of interest to the student of international law”<sup>25</sup>. Further, Judge Hudson has added that the Permanent Court was “seldom called upon to pronounce on issues of fact”<sup>26</sup>.

The PCIJ had two main instruments that governed it: the Statute of the Court and the Rules of the Court. Few rules exist in the Statute on the applicable standard of proof. Much flexibility was left to the Court. There was a wide provision which stated that the “Court shall frame rules for regulating its procedure.”<sup>27</sup>

The rule of the Statute which could explain to a certain degree the standard of proof of the Court was Article 53 which stated that in cases where one party refused to appear before the Court, it must satisfy itself that the claim was “well founded in fact and law”. The Court has provided little clarification on this article. As noted by Hudson, in the drafting of the Article 53, at the proposition of the Italian delegation, the sub-committee of the Third Committee of the First Assembly decided not to include the suggested requirement that the judgment be “supported by substantial evidence.”<sup>28</sup> The Italian Council for Diplomatic Litigation described these words as “useless and dangerous”. This indicated that, from the outset, much flexibility was given to the Permanent Court in determining its own evidential rules. Unlike the ICJ, the PCIJ has never stated that Article 53 was equally applicable to cases where both parties were present.

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<sup>23</sup> See: Chapter 2, Section 2-3, 14-51

<sup>24</sup> The works on the PCIJ include: Fachiri, (1932) which summarises the case law of the PCIJ and addresses the some aspects of the procedural law; Hudson, (1943) A detailed book on the case law of the PCIJ and the PCA, and the history of the drafting of articles of the Statute and rules; Ralston, (1926) covering some aspects of the law and procedures, including evidential rules, of the PCIJ;

<sup>25</sup> Ralston, (1926) 218

<sup>26</sup> Hudson, (1934) 500

<sup>27</sup> Article 30 of the Statute.

<sup>28</sup> Ralston, (1926) 203-204;

The PCIJ has never clearly stated the applicable standard of proof in its jurisprudence<sup>29</sup>. In its cases, the Permanent Court has not used the same terms as those found in municipal law in a way which would indicate the application of a similar standard<sup>30</sup>.

The lack of an explicit indication of the standard of proof can lead to the following conclusions: a) the issue of the standard of proof did not have priority for the Permanent Court, b) the Permanent Court did not want to be tied down by strict rules but emphasized flexibility. The lack of a fixed approach to procedural rules was illustrated in the *Free Zones of Upper Savoy and the District of Gex Case*. The Court declared that “the decision of an international dispute of the present order should not mainly depend on a point of procedure”<sup>31</sup>. In addition, Judge Huber said that the Court “must not run the risk of a case between two States being decided on the basis of a purely formal administration of Justice.”<sup>32</sup>

Although the jurisdiction phase falls outside the scope of this chapter, the practice of the Court is nonetheless worth noting for it might indicate as to the standard not expressed in the merits stage. In the jurisdiction phase of the *Chorzow Factory Case*, the Court seemed to be applying the “preponderant” test by saying that it will “affirm its jurisdiction provided that the force of the arguments militating in favour if it is preponderant”<sup>33</sup>. Further, the Court avoided the question of whether the standard applied was “beyond reasonable doubt” by saying that there was no need to answer the question because the evidence before it was convincing enough<sup>34</sup>. Having said this, it is not certain whether the Court was applying the same test during the merits phase.

### 3.2.1.2 Other Fora:

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<sup>29</sup> The study in this chapter is limited to contentious cases and not advisory opinions.

<sup>30</sup> However, in a different context of considering the arguments of the parties as supposed to the facts, the PCIJ has used terms such as “well-founded” to describe whether the case presented was satisfactory to the Court. See further: *The Meuse Case*, PCIJ, 1937, 19-20, *The Lotus Case*, PCIJ, 1927 Judge Loder: p. 34 Judge Weiss p. 49, *Chorzow Factory Case (Indemnity)*, PCIJ, 1928, 40, 44. Further, the Permanent Court has also used terms such as whether the evidence presented by the parties had “convinced” Court. See: *The Wimbledon Case*, PCIJ, 1923, 25. The Court has addressed various aspects of evidential issues but has not clarified the applicable standard of proof. See further: Sandifer, (1975) see especially Chapter 3 on the production of evidence

<sup>31</sup> *Free Zones of Upper Savoy and the District of Gex*, PCIJ, 1932 ser. A/B, No. 46, at 155-56

<sup>32</sup> During the discussion of a revision of the Rule of the Court in June 1926, ser. D, No. 2 (add), at 100-01

<sup>33</sup> *The Chorzow Case (Indemnity)(Jurisdiction)*, PCIJ, 1927, 32

<sup>34</sup> *The Chorzow Case (Indemnity)(Jurisdiction)*, PCIJ, 1927, 32

Like the PCIJ, other fora that existed pre-1945 are also important to the understanding of the rules of the ICJ. This section will give a brief overview<sup>35</sup>.

International litigation of this period was often in the form of *ad hoc* arbitrations or mixed claim commissions. Similar to the PCIJ, few rules existed restricting the freedom of the judge to evaluate the evidence, particularly on the standard of proof<sup>36</sup>.

Municipal rules and technical rules were seldom incorporated, leaving the arbitrators/judges much discretion as to the procedures. They did not set a precise standard of proof. Judges/arbitrators decided the case on the basis of the strength of the evidence that was set out before them<sup>37</sup>. They have expressed the standard of proof in terms of the sufficiency of the evidence, but often omitting to state what the exact standard was<sup>38</sup>.

There have been some suggestions as to the possible applicable standard. For example, in the *Feuilletan Case*, the Umpire said that the “burden rests upon the respondent government to show by a fair balance of affirmative proof that recompense has been made”<sup>39</sup>. In the *Parker Case* before the United States-Mexican General Claims Commission, it was said that “when the claimant has established a *prima facie* case and the respondent has offered no evidence in rebuttal the latter may not insist that the former pile up evidence beyond reasonable doubt without pointing out some reason for doubting”<sup>40</sup>.

There was not a consistent or definite approach on the standard of proof of the tribunals of this period. As expressed by Judge Lauterpacht, “Apart from the rules of Permanent Tribunals...no specific rules as to evidence and proof have so far evolved in international arbitration.”<sup>41</sup>

### 3.3 The ICJ:

#### 3.3.1 The provisions of the ICJ:

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<sup>35</sup> See generally: Sandifer, (1975) Chapter 3; Bishop, (1930); Carlston, (1946); Kazazi, (1996) in particular 323-352; Hudson, (1943) for cases under the rules of the PCA;

<sup>36</sup> See further: Sandifer, (1975) 457-471

<sup>37</sup> For example, the Commissioners concluded that: “it must decide on the strength of the evidence produced by both parties” *Archuleta Case*, United States-Mexican General Claims Commission, 1929, 76

<sup>38</sup> See cases that are cited: Ralston, (1926) 218-219

<sup>39</sup> As cited by Ralston in Ralston, (1926) 220

<sup>40</sup> *Parker v Mexico*, United States-Mexican General Claims Commission, 1926

<sup>41</sup> See further: Lauterpacht, (1931) 42



The ICJ is governed by several provisions, namely the Statute of the Court, the Rules of the Court, and the Practice Directions.

The Statute does not have a direct provision addressing the issue of the standard of proof. Similar to the PCIJ, the only helpful article is Article 53, even though it is primarily about the non-appearance of one of the parties. It provides that “whenever one of the parties does not appear before the Court, ...the other party may call upon the Court to decide in favour of its claim”, but before doing so, the Court must “satisfy itself, not only that it has jurisdiction in accordance with articles 36 and 37, but also that the claim is well founded in fact and law”<sup>42</sup>. The Statute does not offer any further explanation of the terms used.

However, the Court has stated in a later case that this standard is also applicable in cases where both parties are before the Court, but again, it did not go into detail of the precise definition of the article<sup>43</sup>. This universal applicability of Article 53 is also supported by authors such as Kazazi. He says that “although applicable to cases where one of the parties is absent, it implies that this is a kind of standard of proof which can be applied by the Court in other cases as well.”<sup>44</sup> He went on further to suggest that “well founded in fact and law” is a standard unlike preponderance of proof, but resembles more proof beyond reasonable doubt. “Nevertheless, “well founded in fact and law” could be used for guidance in determining the standard of proof, as well as in combination with other standards.”<sup>45</sup>

The Rules of the Court and the Practice Directions do not address the issue of the standard of proof, but rather other aspects of procedural rules. They cover rules for the litigating parties such as the specifics of how the case should be presented before the Court and rules which regulate the functioning of the Court, such as the number of judges. There are not many rules which restrict the judges’ freedom in evaluating the facts of the case.

### 3.3.2 The jurisprudence of the ICJ:

#### 3.3.2.1 1945-1965:

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<sup>42</sup> *ICJ Statute*, 1945 Art 53

<sup>43</sup> *The Nicaragua Case*, ICJ, 1986, 24 para 24

<sup>44</sup> Kazazi, (1996) 351

<sup>45</sup> Kazazi, (1996) 351

During the first 20 years of the Court, cases varied greatly in nature. They included boundary cases, cases involving State sovereignty, and the application of international conventions. During this period, the most notable case in terms of establishing the standard of proof of the Court was the *Corfu Channel Case*.

#### The *Corfu Channel Case*:

This case was between the United Kingdom and Albania on the question of the responsibility of Albania with regard to mines that two British destroyers struck in the Corfu Channel. In considering the merits of the case, the Court has made various statements which could be used to explain its approach to the standard of proof.

Most notably in this case, and not clearly seen in any other, the Court stated that the evidence presented by the parties must prove the case beyond reasonable doubt, a standard which is most commonly associated with criminal cases in the Common Law legal tradition. This standard was applied to the question of whether Albania knew about the mines in its own territorial waters. The Court stated that it “must examine...whether it has been established by means of indirect evidence that Albania has knowledge of minelaying in her territorial waters independently of any connivance on her part in this operation. The proof may be drawn from inferences of fact, provided that they leave no room for reasonable doubt.”<sup>46</sup> This must be viewed in the light of what the Court later stated: the charge against Albania was of “exceptional gravity” which would “require a degree of certainty that has not been reached here”<sup>47</sup>. There seems to be a correlation between the gravity of the charge with the standard applied.

The rationale behind the Court’s applied standard was further explained by Dr. Ecer in his Dissenting Opinion<sup>48</sup>. He classified the laying of the mines in the Channel as one which was “in reality a criminal act”. Dr. Ecer quoted a Common Law tradition scholar enunciating that such a high standard was needed because of the stigma that was associated with the act<sup>49</sup>. The seriousness of the act in question

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<sup>46</sup> *Corfu Channel Case*, ICJ, 1949, 18

<sup>47</sup> *Corfu Channel Case*, ICJ, 1949, 17

<sup>48</sup> Dr. Ecer did not disagree with the Court on the standard of proof applied and offered an explanation as to why the Court was applying such a standard.

<sup>49</sup> *Corfu Channel Case*, ICJ, 1949, 118-119

corresponding to a higher standard will be discussed later, both in the context of the *Oil Platforms Case*<sup>50</sup> and the interview with the various judges<sup>51</sup>.

However, in addition to standard of beyond reasonable doubt, there were also suggestions that the Court also applied other standards. This has been expressed by Dr. Ecer in his Dissenting Opinion in describing the way in which the Court dealt with indirect evidence. He seemed to be suggesting a standard which required a balancing act. Dr. Ecer said that, from the indirect evidence that was before the Court, it must balance out which conclusion is more likely and, in his opinion, there were factors that “tilt” the balance towards establishing that Albania was not cognizant of the existence of the minefield<sup>52</sup>. The standard applied here resembled the municipal concept of “balance of probabilities” because the Court had to decide which was the more likely conclusion based on the facts.

Another term used by the Court to describe whether it was satisfied with the evidence was the word “conclusive”. In relation to the statements attributed to third parties by the witnesses, the Court said that these allegations “were falling short of conclusive evidence”<sup>53</sup>. However, the Court did not enunciate in anyway what it meant by “conclusive evidence”, or to what standard of proof in municipal law this corresponded to.

In the *Corfu Channel Case*, the applicable standard of proof seemed to be beyond reasonable doubt. There were also other standards mentioned but it is unclear whether the Court actually applied them or what the standard precisely meant.

Other cases in the period:

In addition to the *Corfu Channel Case*, the Court has also dealt with various other cases during this period covering a range of issues. The Court did not seem to be able to apply a consistent standard of proof throughout and did not utilise well-recognised municipal standards.

In 1951, the Court reaffirmed the test in its Statute in the *Fisheries Cases (United Kingdom v. Norway)* concerning a dispute on the fishing zone off the coast of Norway. It said that the “submissions of the applicant State are well-founded in fact

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<sup>50</sup> See: Chapter 4, Section 3.3.2.3, 79

<sup>51</sup> See: Chapter 4, Section 3.3.2.4, 89

<sup>52</sup> *Corfu Channel Case*, ICJ, 1949, 124

<sup>53</sup> *Corfu Channel Case*, ICJ, 1949, 16-17

and law...”<sup>54</sup> These words resemble Article 53 of the Statute as explained earlier. However, the Court failed to enunciate exactly what “well-founded in fact and law” entailed.

Furthermore, the Court also stated that the evidence needed to be “convincing”, expressing this twice. First, the Court said that, in the light of what has been presented to it, it was bound to hold that the Norwegian authorities applied their system of limitation consistently and uninterruptedly from 1869 until the time when the dispute arose unless there was “convincing evidence to the contrary”<sup>55</sup>. Second, the Court said that it “cannot readily find that the lines adopted in these circumstances...are not in accordance with the traditional system” “in absence of convincing evidence to the contrary.”<sup>56</sup> The standard applied in these two scenarios seemed to be the requirement of “convincing” evidence. The Court once again did not enunciate what exactly this standard meant.

Two years later in 1953, the Court used what seemed to be the test of “balance of probabilities”. In the boundary case of *Minquiers and Ecrehos Case (France v. United Kingdom)*, the Court said that it would decide the issue of whether the sovereignty over the islets and rocks of the Minquiers and Ecrehos group belonged to France or the United Kingdom by determining “which of the Parties has produced the more convincing proof of title to one or the other of these groups, or to both of them.”<sup>57</sup> This act of comparing the evidence of the two parties and weighing them resemble the Common Law standard of the balance of probabilities. However, the Court never explicitly stated this or explained the relationship between this standard and those used in previous cases.

In the years that immediately follow, the Court did not pursue this “balance” approach and seemed to have moved back to the criterion where the evidence presented to it needed to be “convincing”. There was no explanation why the Court did this. The cases with this approach were the following.

The *Nottebohm Case* (1955) concerned a claim by Liechtenstein for restitution and compensation on the ground that the Government of Guatemala acted towards its citizen in a manner contrary to international law. Although the Court did not state what the standard of proof applied was, Judge Read said the fact that after his release

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<sup>54</sup> *Fisheries Case*, ICJ, 1951, 40

<sup>55</sup> *Fisheries Case*, ICJ, 1951, 138

<sup>56</sup> *Fisheries Case*, ICJ, 1951, 140

<sup>57</sup> *The Minquiers and Ecrehos Case*, ICJ, 1953, 52

in North Dakota, Mr. Nottebohm returned to Liechtenstein, together with his admission into the country, was sufficient as “convincing” evidence of the real and effective character of his link with Liechtenstein<sup>58</sup>.

In 1959, in a boundary dispute of the *Case Concerning Sovereignty over Certain Frontier Land (Belgium v. Netherlands)*, the Court had to consider whether there was a mistake that would vitiate the Convention in question and granting the sovereignty over the disputed area to Belgium. The Court said that the “only question is whether a mistake...has been established by convincing evidence.”<sup>59</sup> Here, the Court once more regarded “convincing” evidence as enough to discharge the burden of proof.

#### Preliminary Conclusion:

To summarise the first twenty years of the Court’s life, it saw many types of cases ranging from those involving State responsibility to boundary disputes. In its very first case, which involved issues of State responsibility, it applied *inter alia* the highest standard of proof of beyond reasonable doubt. Dr. Ecer later clarified the application of the standard by saying that the case was one which was criminal in nature. In addition, there were boundary cases where the Court applied various standards of proof such as requiring evidence that was “convincing” or introduced an act of balancing the evidence. However, the Court has not been explicit on the standard of proof it applied, and on the exact correlation of the standard applied to the nature of the cases.

#### 3.3.2.2 1965-1985:

##### The cases:

In the second period of the history of the Court, the lack of clarity on the standard of proof continued. There was a mixture of terms used. As well as the terms

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<sup>58</sup> *Nottebohm Case*, ICJ, 1955, 45. In his Dissenting Opinion, Judge Read quoted the case of *Hatton v. United Mexican States* where it was stated that “convincing proof of nationality is requisite not only from the standpoint of international law, but as jurisdictional requirement”. See further: *Nottebohm Case*, ICJ, 1955, 50-51

<sup>59</sup> *Belgium v. Netherlands*, ICJ, 1959, 222

used in the first period of its history, the Court also introduced the notions of “conclusiveness” and “sufficiency”.

In the *North Sea Continental Shelf Case (Germany v. Denmark; Germany v. Netherlands)* in 1969, the Court simply held that the evidence produced was not sufficient. The Court stated that no “complete delimitation in this area has however yet been carried out” and that the evidence before the Court was “inconclusive” and “insufficient” to show that there was settled practice indicating that delimitation according to the principle of equidistance amounts to the mandatory rules of customary international law<sup>60</sup>. With regard to the attitude adopted by the Germany on the issue of its rights in the continental shelf, Judge Sorensen said that the state practice, and in particular its signing of the Geneva Convention was “conclusive” evidence of its attitude towards the Convention<sup>61</sup>. However, the Court did not enunciate what the standard of proof was, leaving open to interpretation the words “conclusive”, “inconclusive”, and “insufficient”.

A few years later in a case concerning the fishing zone off the coast of Iceland, the *Fisheries Jurisdiction Case (Germany v. Iceland)*, the Court reverted back to the “well-founded” formula found in its Statute. In this case, with regard to the amount of damages that was to be determined, the Court said that the evidence did not always indicate the required or an estimation of the amount of the damages. The Court then went on to state that the evidence supporting such a claim must be “detailed”, and only after receiving such evidence can the Court establish that the claim is “well founded in fact and in law”<sup>62</sup>. In the *Fisheries Jurisdiction Case (United Kingdom v. Iceland)*, counsel for the United Kingdom suggested that the standard of proof needed was one which required the evidence to be “convincing”<sup>63</sup>.

In 1982, in another boundary case, the *Case Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, the Court used the “convincing” test once again. When discussing an objection that there was no express acceptance by the authorities of the Tunisian Protectorate of a perpendicular line for the delimitation, the Court held that this was not crucial. One of the decisive points was whether there was “conclusive” evidence that Italian authorities exercised effective surveillance of

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<sup>60</sup> *North Sea Continental Shelf Case*, ICJ, 1969, 45

<sup>61</sup> *North Sea Continental Shelf Case*, ICJ, 1969, 248

<sup>62</sup> *Fisheries Jurisdiction Case*, ICJ, 1974, 204

<sup>63</sup> In this dispute, the issues in question were whether international law recognised the right of a coastal State to make an exclusive claim, like that of Iceland which exceeded the 12-nautical miles from the baseline. *Fisheries Jurisdiction*, ICJ, 1974, 78

sponge fisheries off the Tripolitanian coasts, laterally, to the 22 degrees line and seawards, beyond the 34th parallel<sup>64</sup>.

#### Preliminary Conclusion:

As a summary, in the period of 1965-1985, the ICJ remained unclear as to the applicable standard of proof. It has indicated whether there was enough evidence provided but not a more precise standard. In some of the boundary cases, the Court has again expressed the standard of whether there was convincing evidence but this has not been consistently applied in all boundary cases. There were also other terms used such as whether the evidence was conclusive. Unlike the initial period of the Court's life, there was no mention of the standard of proving a case beyond reasonable doubt even in cases involving State responsibility like the *United States Diplomatic and Consular Staff in Tehran Case*<sup>65</sup>.

#### 3.3.2.3 1985-2007:

In the past two decades, there has probably been more jurisprudence to aid the understanding of the approach of the Court on the standard of proof than ever before. However, that is not to say that the standard is well established. The *Nicaragua Case* was an important case, arguably marking the beginning of a period of the Court's life where more attention is given to the issue of the standard of proof. This focus is also highlighted by the recent *Oil Platforms Case* which will be examined later.

*Military and Paramilitary Activities in and Against Nicaragua (Nicaragua V. United States of America)*:

The *Nicaragua Case* is crucial in trying to understand the standard of proof of the Court<sup>66</sup>. It concerned the allegation by Nicaragua that the United States had given support to a mercenary army, the *contras*, on attacks within the territory of Nicaragua with the aim of overthrowing the government. Nicaragua argued that the United

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<sup>64</sup> *Tunisia/Libyan Arab Jamahiriya*, ICJ, 1982, 131

<sup>65</sup> *The Tehran Hostages Case*, ICJ, 1980, 3

<sup>66</sup> See further on the practice of the Court in this case: Highet, (1987a)

States was using armed force against it through its funding and assistance to the *contras*.

In the oral pleadings of Nicaragua, it was stated that “it is well known that charges of exceptional gravity against a sovereign State or its government require to be established by conclusive evidence involving a high degree of certainty”. This was taken from the *Corfu Channel Case*. However, Counsel for Nicaragua also insisted that “the standard of proof must depend upon the forensic geography of the particular case”. Counsel further added that, in this particular case, there are three factors that affect the standard of proof.

First, quoting the *United States Diplomatic and Consular Staff in Tehran Case*, Counsel argued that Article 53 has effect on the standard of proof in that the Court did not need to examine the accuracy of the submissions in all their details but it needed to convince itself they were well founded. Second, the standard of proof must reflect the fact that the Respondent has not appeared before the Court to deny the allegations that have been made against it. Third, there were indications in public records as to the United States’ illegal purpose and the responsibility for illegal actions. Counsel then concluded that the standard of proof that should be applied in this case was one of “reasonable certainty”<sup>67</sup>.

What is important to note is the statement of the Court: “it is clear that general principles of judicial procedure necessarily govern the determination of what can be regarded as proved.”<sup>68</sup> Yet, the Court did not define what these “general principles of judicial procedure” were. Are they municipal rules? Are they the rules of the Common Law tradition, the Civil Law tradition, or other legal traditions?

The most significant contribution of the *Nicaragua Case* on the issue of standard of proof was probably the statement of the Court addressing Article 53 of the Statute. The Court said that “the use of the term “satisfy itself” in the English text of the Statute (and in the French text the term “s’assurer”) implies that the Court must attain the same degree of certainty as in any other case that the claim of the party appearing is sound in law, and, so far as the nature of the case permits, that the facts on which it is based are supported by convincing evidence.”<sup>69</sup> In other words, the Court has confirmed that Article 53 equally applies to cases where both parties are present. Further, the Court seemed to be setting a standard consistent with many prior

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<sup>67</sup> This standard was also argued in: *DRC v Uganda*, ICJ, 2005 CR 2005/3, 12 April

<sup>68</sup> *The Nicaragua Case*, ICJ, 1986, 40

<sup>69</sup> *The Nicaragua Case*, ICJ, 1986, 24 para 24



cases, namely that the evidence must be “convincing”. Once again, the Court omitted the precise definition of the word. In addition, what could be inferred from the statement that the evidence must be of this standard “so far as the nature of the case permits”? Could this imply that the standard of proof of the Court is variable contingent on the amount of evidence that is available? If this is the case, how does it determine which case deserves a change in the standard of proof, and in cases where it is necessary, how and by what margin does it regulate the change? Here, the Court seemed to have taken into account the proposal of the Nicaraguan counsel that the standard of proof must reflect the nature of the case. However, the Court did not state that the standard was “reasonable certainty”, but rather one which required “convincing evidence”.

The test of whether the evidence can “convince” the Court was used again in various places in the judgment. The clearest statement and one that addresses the interpretation of Article 53 most directly was probably by Judge Schwebel. He stated “...the real point is that, where objections are raised to the appearing party’s contentions, that party must convince the Court that those objections are unfounded if the Court is to meet the standard which article 53 imposes.”<sup>70</sup>

In addition, the Court also arguably applied a test similar to the Common Law notion of the “balance of probabilities”. On determining that there was armed opposition in El Salvador from Nicaraguan territory, the Court stated that even though it did not have “full proof that there was aid, or as to its exact nature, its scale and its continuance until the early months of 1981, it cannot overlook a number of concordant indications, many of which were provided moreover by Nicaragua itself, from which it can reasonably infer the provision of a certain amount of aid from Nicaraguan territory”<sup>71</sup>. Although not explicit, by allowing a degree of uncertainty, the Court seemed to be applying a standard resembling the “balance of probabilities” test.

More, the *Nicaragua Case* has also pointed out one crucial aspect of the way the Court evaluates evidence: deciding whether the evidence has satisfied the standard of proof can be a subjective process. Following the decision in the *United States Diplomatic and Consular Staff in Tehran Case*, the Court deemed it sufficient to establish some facts as public knowledge through press information, raising questions

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<sup>70</sup> *The Nicaragua Case*, ICJ, 1986, 320

<sup>71</sup> *The Nicaragua Case*, ICJ, 1986, 82

whether this can satisfy the standard of proof and underlining the subjectivity of the procedure<sup>72</sup>.

Cases after the *Nicaragua Case*:

After the *Nicaragua Case*, the Court again reverted to saying little about the standard of proof. Its approach was varied and inconsistent. In many cases, the Court merely stated that the evidence was not sufficient to uphold the claim.

In the *ELSI Case* (1989), the Chamber of the Court merely stated that “there is not sufficient evidence...to support the suggestion that there was a plan to favour IRI at the expense of ELSI, and the claim of “discriminatory measures” in the sense of Article I of the Supplementary Agreement must therefore be rejected.”<sup>73</sup> Another indication as to the possible standard applied by the Court was mentioned by Judge Schwebel. After concluding that the arguments were unpersuasive, he suggested that the evidence or the demonstration of the claim needed to be “convincing” in order to discharge the burden of proof<sup>74</sup>.

In the *Land, Island, and Maritime Frontier Dispute Case* (1992), on the question of whether an *uti possidetis juris* position could be established by acquiescence or recognition, the Chamber of the Court stated the requirement to be “sufficient evidence”<sup>75</sup>. In addition, the judgment also suggested that the standard of proof was one that balances probabilities. The Chamber said “of the other two explanations put forward, the Chamber considers that advanced by Honduras, on balance, more likely; it considers that if what was contemplated was solely the risk of incursions by the inhabitants of the province of Comayagua, this would probably have been spelled out specifically in the document...”<sup>76</sup> The Chamber used the “balance” notion in several other places in the judgment. The Chamber stated that “the fact that El Salvador has continued to present a consistent interpretation of the 1743 title does not prove that it is a correct one”, and that “on balance, it concludes that the Torola

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<sup>72</sup> *The Nicaragua Case*, ICJ, 1986, 41. See further on this issue: Highet, (1987a) 39-43, 49-51. Highet noted the high degree on which the Court was dependent on indirect evidence including press reports to establish the facts of the case. He commented that this could be a result of the non-appearance of the United States leaving the Court very few options. ; See also Judge Schwebel's Dissenting Opinion commenting that the Court's finding of the facts was skewed in favour of Nicaragua in the way it selected and assessed news reports. Dissenting Opinion of Judge Schwebel *The Nicaragua Case*, ICJ, 1986, 271-273, 279-80, 295-296

<sup>73</sup> *The ELSI Case*, ICJ, 1989, 73

<sup>74</sup> *ELSI*, ICJ, 1989, 117-118

<sup>75</sup> In cases where there was “sufficient evidence”, “there seems to be no reason in principle why these factors should not operate.” *El Salvador V. Honduras*, ICJ, 1992, 401

<sup>76</sup> *El Salvador V. Honduras*, ICJ, 1992, 484

title extended to the Yuquina or Las Canas river, and was not bounded by the Masire.”<sup>77</sup> Further, the Chamber stated that “on balance, the Chamber accepts the contentions of El Salvador that the Colomoncagua lands did not at any point extend across the river Las Canas...<sup>78</sup>, but most significantly, the Chamber went on to say that “accordingly the Chamber considers, on a balance of probabilities, there being no great abundance of evidence either way, that the river Las Canas was the provincial boundary, and hence the *uti possidetis* line, downstream as far as the point where it turns southwards, to merge eventually with the river Torola.”<sup>79</sup> The emphasis in this judgment has been on the “balance of probabilities” test, highlighted by the last statement.

However, in the same case, Judge Torres Bernadez suggested that the standard of proof was “beyond reasonable doubt” in his Separate Opinion. This was concerning the question of whether “the Alcaldia Mayor de Minas of Tegucigalpa...exercised the same range of territorial jurisdictional powers as had any main administrative subdivision of the Captaincy-General of Guatemala before the introduction into Central America, in 1786, of the system of intendencias.”<sup>80</sup> The Separate Opinion raises questions. What can be deduced from the mentioning of two standards of proof in the same judgment? Was Judge Torres Bernardez the only judge who was applying the higher standard<sup>81</sup>? If so, what implications could this have?

After this case, the Court reverted to the lack of clarity on the standard of proof. In his Separate Opinion in the *Case Concerning Land and Maritime Boundary between Cameroon and Nigeria*, and although only at the preliminary stages of the case, Judge Ajibola said that there was “no conclusive or convincing evidence” to determine the issue at hand and that the issue must be left to the merits phase<sup>82</sup>. This suggests that this standard would have been applied if the case had reached the merits stage.

More recently in 1997, in the *Gabcikovo-Nagymaros Project Case*, the Court once more expressed its standard of proof in terms of sufficiency of the evidence. It

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<sup>77</sup> *El Salvador V. Honduras*, ICJ, 1992, 497

<sup>78</sup> *El Salvador V. Honduras*, ICJ, 1992, 502

<sup>79</sup> *El Salvador V. Honduras*, ICJ, 1992, 506

<sup>80</sup> *El Salvador V. Honduras*, ICJ, 1992, 683

<sup>81</sup> In the more recent judgment of *Qatar v Bahrain*, Judge Torres Bernardez also applied the standard of “beyond reasonable doubt” in his Dissenting Opinion. He stated that “in any case, the Ottoman period of Qatar proves beyond any reasonable doubt the absence of a continuous exercise of State authority by Bahrain in the Qatar peninsula and the adjoining islands, namely of one of the essential elements required by international law for an alleged authority to become a possible source of title to territory.” *Qatar v Bahrain*, ICJ, 2001, 3001-301

<sup>82</sup> *Cameroon v. Nigeria*, ICJ, 1996, 39

said that it “has not found sufficient evidence to conclude that Czechoslovakia had consistently refused to consult with Hungary about the desirability or necessity of measures for the preservation of the environment.”<sup>83</sup> The “sufficiency” test was also suggested by Judge Koroma. He stated that, although the Court took into consideration the scientific evidence presented by Hungary regarding the environmental effects of the project, this evidence “was not sufficient to allow Hungary unilaterally to suspend or terminate the Treaty.”<sup>84</sup>

### *Oil Platforms Case:*

The recent *Oil Platforms Case* is one of the few cases in the jurisprudence of the Court that has addressed the issue of the standard of proof. It concerned a dispute between Iran and the United States. Iran instituted proceedings against the United States regarding attacks on three offshore oil complexes, owned by the National Iran Oil Company, by warships of the United States Navy. In turn, the United States filed a counter-claim concerning “Iran’s actions in the Gulf during 1987-88 which, among other things, involved mining and other attacks on US flag or US owned vessels”<sup>85</sup>.

On the standard of proof, the *Oil Platforms Case* shows that the debate is still alive. Judge Higgins addressed this issue in her Separate Opinion. She briefly went through the jurisprudence of the Court outlining the important cases and some of the problems the Court faces. Judge Higgins then reaffirmed the established notion that the party that seeks to establish a fact must prove it. However, she was critical of the method through which the Court arrived at its decision and in particular the question of what standard of proof the Court was using to establish sufficiency of the evidence. Judge Higgins highlighted the importance of establishing a clear standard of proof since so much of a case can turn on evidence. She further recognised that some international tribunals had addressed this issue and that the ICJ should do the same.

Judge Higgins observed that the primary objective of the Court seemed to be to grant itself as much freedom in evaluating the evidence as possible. She mentioned the *Corfu Channel Case* and the *Nicaragua Case* only to come to the conclusion that these cases did not establish a clearly defined set of rules<sup>86</sup>.

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<sup>83</sup> *Gabcikovo-Nagymaros Project Case*, ICJ, 1997, 66

<sup>84</sup> *Gabcikovo-Nagymaros Project Case*, ICJ, 1997, 144 (Separate Opinion of Judge Koroma)

<sup>85</sup> *Oil Platforms Case*, ICJ, 2003 para 9

<sup>86</sup> *Oil Platforms Case*, ICJ, 2003 Judge Higgins’s separate opinion, para. 32

In the judgment of the Court itself, the standard of proof applied was again far from clear. From the wording, it can be suggested that the Court was using the “balance of probabilities” test. Judge Higgins has stated that the Court “has satisfied itself with saying that it did not have to decide “on the basis of a balance of evidence” by whom the missile that struck the Sea Isle City was fired.”<sup>87</sup> The Court later concluded that the evidence was insufficient.

The Court also indicated as to what was needed from the parties in terms of evidence. It concluded that there “was no direct evidence at all of the type of missile that struck the Sea Isle City; the evidence as to the nature of other missiles fired at Kuwaiti territory at this period is suggestive, but no more”<sup>88</sup>. This means that, to satisfy the Court, the evidence needed to be more than suggestive. On this point, Judge Higgins added that it was not clear “whether the Court is rejecting the indirect evidence *per se* (though it was clearly accepted by the Court in the *Corfu Channel Case*, Merits, I.C.J. Reports 1949, p. 18), or whether it was accepting indirect evidence but that in this particular case it did not meet the standard “no room for reasonable doubt” enunciated in the same case in 1949 (*ibid.*, p. 18)”<sup>89</sup>. From the judgment, there was no further indication that the Court was using the high standard adopted in the *Corfu Channel Case*.

What is further worth noting is the mine that struck the USS Samuel B. Roberts. The Court recognised that there were comparable moored mines in the same area, and they had serial numbers matching other Iranian mines and those found on board the vessel Iran Ajr. As expressed by Judge Higgins, this evidence “is on any test rather weighty”, especially when compared with the issue of the missiles that struck the Sea Isle City. However, the Court only held that this evidence was “highly suggestive, but not conclusive”<sup>90</sup>. The way in which the Court reached this conclusion was not explicit. But it meant that evidence that was “highly suggestive” could not discharge the burden of proof while evidence that was “conclusive” could.

In addition to Judge Higgins, other judges also expressed concern and views about the standard of proof. In the context of the difficulty in ascertaining the facts of the case, Judge Owada pointed out that the rules of the Court on evidence were not

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<sup>87</sup> *Oil Platforms Case*, ICJ, 2003 Judge Higgins’s separate opinion, para. 34

<sup>88</sup> *Oil Platforms Case*, ICJ, 2003 para 59

<sup>89</sup> *Oil Platforms Case*, ICJ, 2003, Judge Higgins’s Separate Opinion, para 35

<sup>90</sup> *Oil Platforms Case*, ICJ, 2003 para 71

well developed<sup>91</sup>. He further stated that the rules needed to be so to address the scenario where one party could find it hard to discharge the burden of proof placed upon them<sup>92</sup>.

Judge Buergenthal also expressed the view that the standard of proof set by the Court was unclear. He questioned the term “insufficient” used by the Court, pointing out that there was no precise definition. He made suggestions as to what could constitute “sufficiency” for the Court, covering a range of terms including “convincing”, “preponderant”, “overwhelming” and “beyond a reasonable doubt”<sup>93</sup>. These were terms that the Court had used in its jurisprudence. Judge Buergenthal then underlined the problem of the lack of clarity regarding the standard of proof. Concerning the mines that struck USS Samuel B. Roberts, he noted the inconsistency of the Court in first setting the standard as requiring “sufficient” evidence and changing it to requiring “conclusive” evidence without an explanation. He agreed with Judge Higgins on why “highly suggestive” was not sufficient for the Court in this particular case<sup>94</sup>.

The *Oil Platforms Case* was significant in terms of the study on the standard of proof. It has shown that the Court still has not laid down a set of clear rules. However, it has used many terms in describing what evidence is required including that evidence needed to be: (a) “sufficient”<sup>95</sup>, (b) “convincing”<sup>96</sup>, and (c) “conclusive”<sup>97</sup>. In the judgment of the Court, as already mentioned, the standard of the “balance of probabilities” was applied<sup>98</sup>. Other standards were also expressed by the judges of the Court. In his Separate Opinion, Judge Koojimans seemed to be applying the standard of “beyond reasonable doubt” on the issue of the mines that caused damage to the USS Samuel B. Roberts<sup>99</sup>.

What is also clear from this case is the concern that some of the judges have for the lack of clarity on the standard of proof and the need for the Court to address the issue, as shown by the Opinions of Judge Higgins and Buergenthal. It is worth noting that both of these judges come from the Common Law background where the rules of evidence are clearly laid out when compared to the Civil Law tradition.

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<sup>91</sup> *Oil Platforms Case*, ICJ, 2003 Judge Owada’s Separate Opinion, para 52

<sup>92</sup> See further: *Oil Platforms Case*, ICJ, 2003 Judge Owada’s Separate Opinion, para 46-52

<sup>93</sup> *Oil Platforms Case*, ICJ, 2003 Judge Buergenthal’s Separate Opinion, para. 41

<sup>94</sup> *Oil Platforms Case*, ICJ, 2003 Judge Buergenthal’s Separate Opinion, para. 41 & 44

<sup>95</sup> For example, see Judge Koojimans’s Opinion *Oil Platforms Case*, ICJ, 2003 para 56

<sup>96</sup> For example, see Judge Koojimans’s Opinion *Oil Platforms Case*, ICJ, 2003 para 54

<sup>97</sup> *Oil Platforms Case*, ICJ, 2003 para 71

<sup>98</sup> *Oil Platforms Case*, ICJ, 2003 para 57

<sup>99</sup> Judge Koojimans’s Opinion *Oil Platforms Case*, ICJ, 2003 para 56

Perhaps they have had the advantage of having seen the benefits of a clear set of rules. The question then arises of what factors play a role in determining the approach of the Court, an issue which will be addressed later<sup>100</sup>.

#### Armed Activities in the Territory of Congo (DRC v Uganda):

The case of *Armed Activities on the Territory of Congo (DRC v Uganda)* concerned a claim brought by Democratic Republic of Congo against Uganda with respect to armed aggression perpetrated by Uganda on its territory.

The Court once again did not clearly set the standard of proof to be met by the parties. This was despite the efforts of the parties to argue on the issue before the Court, maybe urging the Court to suggest the applicable standard. Counsel for the DRC suggested in their pleadings that the correct standard to apply was one of “reasonable certainty”, but also said that some issues could be established “without any shadow of doubt”, and that “there is no room for reasonable doubt in this regard”. The DRC argued that the Court is not fixed by firm rules on standard of proof, and pointed out the standard set by the *Land, Island, and Maritime Frontier Dispute Case (El Salvador v. Honduras)* of “balance of probabilities, and proving “beyond reasonable doubt” in the *Corfu Channel Case*<sup>101</sup>. Counsel for Uganda responded by referring to the *Corfu Channel Case* and stating that the standard of proof for the Court was one of “beyond reasonable doubt”.

The judgment itself indicated that the Court has no intention to directly address the applicable standard of proof. On the question of the support for anti-Ugandan rebel groups by Congo, the Court merely said that the Uganda failed to provide “conclusive evidence”<sup>102</sup>. The Court seemed to be addressing the question of the standard of proof in another way, by stating what sort of evidence would have probative value. For example, “The Court will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. It will prefer contemporaneous evidence from persons with direct knowledge. It will give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them...”<sup>103</sup> The lack of

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<sup>100</sup> See: Chapter 4, Section 3.4.91 and Chapter 7, Section 3, 257

<sup>101</sup> *DRC v Uganda*, ICJ, 2005 Verbatim Record 2005/3 - Public hearing held on Tuesday 12 April, p. 13-23

<sup>102</sup> *DRC v Uganda*, ICJ, 2005 para 303

<sup>103</sup> *DRC v Uganda*, ICJ, 2005 para 61

enthusiasm on the part of the Court to specify the standard of proof, as illustrated by this case, was also apparent from the interviews of the judges of the Court as will shown in the following section.

#### The Genocide Case (Bosnia and Herzegovina v. Serbia and Montenegro)

The latest development concerning the standard of proof applied by the Court is the recent *Genocide Case*. This case is significant because it is the first case that the Court has had to address the issue of the standard of proof directly. The case concerned Bosnia and Herzegovina (“Bosnia”) on one hand and Serbia and Montenegro (“Serbia”) on the other. Bosnia had claimed that the Federal Republic of Yugoslavia (later Serbia) had violated the Convention on the Prevention and the Punishment of the Crime of Genocide (the Genocide Convention).

Regarding the issue of the standard of proof, the Applicant argued that the standard applied should be the balance of evidence or the balance of probabilities because the case concerns a treaty obligation. In contrast, the Respondent suggested that the standard of proof should be proof beyond reasonable doubt because the proceedings concerned the most serious issues of State responsibility<sup>104</sup>.

However, the Court did not adopt either standard suggested by the parties but stated: “The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive (cf. *Corfu Channel (United Kingdom v. Albania)*, *Judgment*, *I.C.J. Reports 1949*, p. 17). The Court requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts....In respect of the Applicant’s claim that the Respondent has breached its undertakings to prevent genocide and to punish and extradite persons charged with genocide, the Court requires proof at a high level of certainty appropriate to the seriousness of the allegation.”<sup>105</sup>

What is of note from this case are the following. First, the Court did not define the standard of proof in terms as suggested by the parties which were those used in the Common Law Tradition. Second, the Court defined the standard as

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<sup>104</sup> *The Genocide Case*, ICJ, 2007 para 208

<sup>105</sup> *The Genocide Case*, ICJ, 2007 para 209-210



requiring evidence which is “fully conclusive” for “claims against a State involving charges of exceptional gravity”. Third, the Court has confirmed the applicable variable standard by saying that, regarding undertakings to prevent genocide and to punish and extradite persons charged with genocide, the Court requires proof at a high level of certainty appropriate to the seriousness of the allegation<sup>106</sup>. The Court did not go further to define standards of proof applicable to other types of cases in the *Genocide Case*.

#### Preliminary conclusion

The understanding of the standard of proof has increased significantly in the last twenty years of the Court’s life. The Court has given certain indications as to the applicable standard of proof. In the *Nicaragua Case* involving State responsibility, as well as stating that Article 53 of the Statute is also applicable where both parties are present, the Court also linked the term “satisfy itself” in the article with the notion of producing “convincing” evidence. The Court in the *Oil Platforms Case* applied a high standard of proof on the question of the Iranian mines. However, it did apply the balance of probabilities test to the issue of who fired the missile on the Sea Isle City. In the boundary dispute of *Land, Island and Maritime Frontier Dispute Case*, the Court used the standard of balancing the probabilities<sup>107</sup>. Finally, in the *Genocide Case*, the Court further clarified the standard applicable to charges of exceptional gravity to be requiring “fully conclusive” proof, confirmed the variable nature of the standard of proof, but did not defined standards applicable to other types of cases. The Court has also expressed the standard of proof in other cases, including boundary cases, as needing “convincing” evidence. In other cases, the Court has merely stated whether the evidence was “sufficient”.

#### 3.3.2.4 Interviews with the judges

Interviews with three judges of the Court have given this study an insight. When asked the question of what is the standard of proof applied by the Court, none of the three judges gave a straight-forward answer or a recognised municipal law

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<sup>106</sup> The Court merely stated that the standard required is high without defining it precisely.

<sup>107</sup> Judge Bernardez applied the test of beyond reasonable doubt in the case.

standard. There is no general policy on the standard of proof. Judges A and B noted that the current situation, where there is a lack of clarity is far from satisfactory<sup>108</sup>. In contrast, Judge C said that there were both advantages and disadvantages to the current arrangement.

All three judges agreed on the principle that the more serious the act in question, the higher the standard would be. Judge C added that this shifting standard of proof could be compared to the Common Law tradition where, even in the trial of civil cases, the standard of proof could be increased if there are issues with criminal elements such as fraud. Judge A stated that the Court would use a standard similar to a criminal standard for cases of a criminal nature<sup>109</sup>. Judge C said that, for a case that was essentially criminal, the standard applied would almost be like the Common Law standard for criminal cases<sup>110</sup>.

When asked the question of how the judge determines what case is sufficiently serious to apply a higher standard, there was a mixture of responses. Judge A replied that this has to be taken on a case by case basis and that there are no fixed rules on determining what act would merit the application of a higher standard of proof. He further added that he would have to use his “gut-feeling”. In contrast, Judge B did give examples of what would constitute a serious act warranting a higher standard: (a) major uses of force, (b) breaches of humanitarian law. Judge C said the way to determine whether acts are serious is not a clear and mechanical process and he would have to look at the issue on a case by case basis.

Regarding the reason as to why the Court has not been more explicit as to the standard of proof, all three judges share the view that this has been caused by the lack of agreement among the members of the Court. There are some judges who: (a) encourage a clear set of rules on the standard of proof<sup>111</sup>, (b) think that there is no need to explicitly state the standard of proof<sup>112</sup>, (c) find themselves in the middle of the two extremes<sup>113</sup>. There is a divide between Common Law and the Civil Law judges. Judge A and C have suggested that this divide exists because rules on

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<sup>108</sup> Questions were also raised as to what can be done to solve the problem. This section of the interviews will be discussed in the concluding chapter of the thesis.

<sup>109</sup> However, he refused to confirm that the standard applied was beyond reasonable doubt. Judge A underlined the fact that one must be careful in dealing with this issue and in trying to put with the debate of the rules of the Court into the context of municipal law.

<sup>110</sup> Judges of other tribunals have also expressed the view that the ICJ seem to be applying a standard higher than preponderance of evidence when faced with cases concerning a serious act, e.g. Judge E of ITLOS.

<sup>111</sup> Judge B belongs to this group. He has made a comment that he has tried to

<sup>112</sup> Judge A has expressed that many judge from the Civil Law tradition are in this group. Judge B suggests that the majority of the judges are in this group.

<sup>113</sup> Judge A belongs to this group.

evidence play a very important role in the Common Law tradition and much less so in the Civil Law tradition<sup>114</sup>. Judge A further suggested that, on the whole, judges from the Civil Law tradition tend to be less aware of the importance of setting out the evidential rules. Judge B has suggested that the majority of the judges from the Civil Law tradition, as far as he can tell, still apply the vague Civil Law notion of the *conviction intime*.

As for the question of the future direction of the Court on the standard of proof, Judge B pointed towards the *DRC v Uganda Case*. He added that, in this case, the Court was avoiding setting a standard of proof. Instead, the Court addressed the question by stating what evidence would be of high probative value. He further added that it is likely that this would be the way in which the Court would handle this issue in the future.

### 3.4 Concluding Remarks:

The aim of this section was to examine the practice of the Court and to understand its approach on the standard of proof. In its jurisprudence, the Court has not specified one standard of proof, but used a variety of terms to indicate whether the evidence supplied by the parties has been sufficient. The terms used varied from case to case and included: a) “beyond reasonable doubt”, b) “fully conclusive” evidence, c) “balance of probabilities”, d) convincing evidence, or where the evidence convinces the Court, e) conclusive evidence, f) the claim being well-founded, or merely g) sufficient evidence.

The Court did not use any of these terms consistently in a way that one could be singled out as the universally applied standard. Some terms were used more often by some judges, e.g. “beyond reasonable doubt” was often used by Judge Torres Bernardez. Some were used more in a particular period, e.g. “balance of probabilities” was used more from 1986-1996.

The priority of the Court seems to be to “retain a freedom in evaluating the evidence”<sup>115</sup>. The uncertainty in the Court’s rules on standard of proof has also been expressed by Rosenne: “there is little to be found in the way of rules of evidence and a striking feature of the jurisprudence is the ability of the Court frequently to base its

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<sup>114</sup> Judge C commented that there are so many different cultures on the bench.

<sup>115</sup> *Oil Platforms Case*, ICJ, 2003 Judge Higgins’s separate opinion, para. 31

decisions on undisputed facts, and in reducing voluminous evidence to manageable proportions.”<sup>116</sup> From the jurisprudence and the interviews, it is shown that the Court applies a high standard of proof to cases of a serious nature. The standard would then shift according to the nature of the case.

However, it was not initially clear what precisely this high standard was. In the *Corfu Channel Case*, in relation to the argument of the United Kingdom that the minefield was laid with the connivance of the Albanian Government, the Court said: “A charge of such exceptional gravity against a State would require a high degree of certainty that has not been reached here.”<sup>117</sup> In relation to inferences of fact, the Court added that “the proof may be drawn...provided that they leave no room for reasonable doubt.”<sup>118</sup> Dr. Ecer explained the rationale of the Court for applying the highest standard by saying that the act in question was “in reality a criminal act”<sup>119</sup>. However, in the recent *Genocide Case*, the Court stated that the standard applied to cases with charges of exceptional gravity is the requirement of “fully conclusive” evidence.

The ability for the Court to shift the standard of proof was lately confirmed by: a) Judge Higgins in the *Oil Platforms Case* who said that the “graver the charge the more confidence must there be in the evidence relied on”<sup>120</sup>, b) the *Genocide Case*. In addition, the Court has also suggested that the standard of proof can vary according to the circumstances of the case. For example, these could be factors such as the non-appearance of one of the parties and lack of evidence due to such circumstances. This is supported by the Court’s statement in the *Nicaragua Case*, where it said that there must be a degree of certainty, “as far as the nature of the case permits”<sup>121</sup>.

In principle, the variable standard of proof can function well for the Court, and it is arguably required because of the many types of cases that come before it. Cases that involve State responsibility, such as the *Corfu Channel Case*, should require a standard of proof that is higher than those involving maritime delimitation.

However, the problem is not the use of a variable standard of proof, but rather the way in which it is regulated, i.e. what standard is applicable to what sort of cases, and by how much should the standard change. For example, in the *Corfu Channel*

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<sup>116</sup> Rosenne, (1965) 2:580

<sup>117</sup> *Corfu Channel Case*, ICJ, 1949, 16-17

<sup>118</sup> *Corfu Channel Case*, ICJ, 1949, 18

<sup>119</sup> *Corfu Channel Case*, ICJ, 1949, 118-119

<sup>120</sup> *Oil Platforms Case*, ICJ, 2003 Judge Higgins’s Separate Opinion, para 33

<sup>121</sup> *The Nicaragua Case*, ICJ, 1986, 24

*Case*, the Court has never defined or explained the term “grave charge” and its relationship with standard of proof.

As pointed out by Judge C, this variable standard of proof is also used in the municipal context. For example, in the English jurisdiction, the standard of proof in civil proceedings can increase in cases where there are allegations of a criminal conduct, such as fraud<sup>122</sup>.

Another aim of this section is to examine what factors play a role in determining the approach of the Court on standard of proof. However, this will be left to the conclusion of the chapter and the thesis. The study will then have the benefit of a comparative analysis of the three tribunals and all three aspects of evidential rules.

#### 3.4.1 Understanding the terms used by the Court:

This section will attempt to understand the different terms used by the Court as the standard of proof. In addition to the terms recognised from the municipal context such as the “balance of probabilities” and “beyond reasonable doubt”, there have also been other terms used which are worth examining.

First, the Court has often expressed its standard in terms of whether the evidence was sufficient, or whether the evidence has satisfied it. *Prima facie*, the words are not very indicative of the standard applied but only that the evidence has to meet the standard set. However, the definition of “satisfy” has been addressed by the *Nicaragua Case*. The Court said that it “must attain the same degree of certainty as in any other case that the claim of the party appearing is sound in law, and, so far as the nature of the case permits, that the facts on which it is based are supported by convincing evidence.”<sup>123</sup> Here, there seems to be a link between the satisfaction of the Court and “convincing” evidence.

The Court has also stated that the evidence needed to be “convincing” or that it needed to “convince” the Court without stating precisely what this meant. Although not expressed in exactly the same way, this standard resembles the Civil Law notion of requiring the conviction of the judge. However, the Court has made no such

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<sup>122</sup> But it does not reach the high level as found in criminal proceedings. For example in *Bater v. Bater*, *Bater v. Bater*, Court of Appeal, 1951, 35, 37, and *Hornal v. Neuberger Products Ltd*, *Hornal v. Neuberger Products Ltd*, Queen's Bench, 1957, 247, 266

<sup>123</sup> *The Nicaragua Case*, ICJ, 1986, 24

comparison leaving uncertainty of its intentions. Even if it had, the notion of the conviction of the judge is also far from being precise. In light of this, the plain meaning of the word will be examined. The word “convincing” is defined as: “able to cause to believe firmly in the truth of something; (of a victory or a winner) leaving no margin of doubt”<sup>124</sup> or “making somebody feel certain; cause somebody to realise”<sup>125</sup>. From these definitions of “to cause to believe firmly” or “making somebody feel certain”, the standard required seems quite high, higher than that of “balance of probabilities”.

The Court has also used the word “conclusive” without a clear definition. The plain meaning of the word suggests that it is quite similar to that of “convincing”, being defined as “convincing; ending doubt”<sup>126</sup>. However, the latest use of the term “fully conclusive”, from the context of the *Genocide Case*, suggested the very high standard resembling the Common Law notion of proof beyond reasonable doubt.

In addition, the Court has often stipulated that the claim needed to be “well-founded” in fact and law. This is the only standard mentioned in the Statute. But again, the Court has never gone into detail about its precise definition. The plain definition only indicates that the claim has to be based on good evidence, saying little about the standard.

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<sup>124</sup> The Oxford Concise Dictionary

<sup>125</sup> The Oxford Advanced Learner's Dictionary

<sup>126</sup> The Oxford Advanced Learner's Dictionary

## Section 4: ITLOS:

### 4.1 Introduction:

Compared to the ICJ, ITLOS is a relatively new forum, created through Part XV of UNCLOS. Regarding the study of the standard of proof, what must be noted is that, in its ten year history, the Tribunal still needs time for its jurisprudence to build up to the same level as other tribunals.

This section will examine the instruments and the jurisprudence of the Tribunal. However, cases under examination will be limited to full merits cases, excluding provisional measure cases. This is for consistency with the examination of the cases in the other tribunals where provisional measure cases are also excluded. Further, the standard of proof applied to provisional measure cases might differ to those heard on the merits because of their nature, seeking to *prima facie* protect the rights of the parties<sup>127</sup>. However, in the context of ITLOS, prompt release cases will also be included. Although not exactly the same as full merits cases, these cases are “complete” in themselves where the entirety of the issue of prompt release is before the Tribunal<sup>128</sup>. However, the nature of prompt release cases is not identical to full merits cases: speed is still very important in these cases, perhaps demanding a different standard of proof.

### 4.2 The provisions of ITLOS:

ITLOS is governed by Part XV of UNCLOS, the Statute of the Tribunal, the Rules of the Tribunal, the Guidelines concerning the Presentation of Cases before the Tribunal, and the Resolution on the Internal Judicial Practice of the Tribunal.

Part XV of UNCLOS is silent on the issue of the standard of proof. The Convention is more concerned with the setting up of the Tribunal itself.

As far as the Statute of the Tribunal and the Rules of the Tribunal are concerned, their drafting has been greatly influenced by the instruments of the ICJ<sup>129</sup> which means that there are no provisions directly expressing the standard of proof.

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<sup>127</sup> This could have an effect of lowering the standard.

<sup>128</sup> Another reason why prompt release cases will be included is the lack of full merits cases in this forum.

<sup>129</sup> Rao, (1998) 374

What is first underlined is the power of the Tribunal to decide its own rules. Article 16 of the Statute states: “The Tribunal shall frame rules for carrying out its functions. In particular it shall lay down rules of procedure.” Similar to the ICJ, the only article relating to the standard of proof governs the situation where one party is absent, Article 28. In cases of default, it uses the same terminology as the ICJ Statute that “Before making its decision, the Tribunal must satisfy itself not only that it has jurisdiction over the dispute, but also that the claim is well founded in fact and law.”

The Rules of the Tribunal do not address the general definition of the standard of proof. In the context of the prompt release of vessels, Article 113 of the Rules states that the Tribunal shall determine “whether or not the allegation...that the detaining State has not complied with a provision of the Convention for the prompt release of the vessel or the crew upon the posting of a reasonable bond or other financial security is well-founded”. This article sets a similar test to the Statute of the Tribunal as observed above. With regard to the preliminary proceedings, Article 294 of the Rules states that the Tribunal must decide “whether the claim constitutes an abuse of legal process or whether *prima facie* it is well founded.”

Neither the Guidelines nor the Resolution on the Internal Judicial Practice provide any rules on the standard of proof. They are both concerned with other aspects of the Tribunal, namely how the parties should present the case to the Tribunal and what procedure the Tribunal will use in reaching the judgment in a case.

In sum, the instruments of the Tribunal have provided little in terms of stating the applicable standard of proof. They have been based on the provisions of the ICJ and share many characteristics. For example, the only article which really addresses the issue is Article 28, which introduces the “well-founded” test, applicable only to scenarios where one party is not before the Tribunal<sup>130</sup>.

#### 4.3 The jurisprudence of ITLOS:

Regarding the standard of proof, the jurisprudence of the Tribunal has been limited and those that exist do not enunciate much on the definition.

In its very first case, *the Saiga*, the Tribunal adhered closely to the Statute saying that the allegation made by St. Vincent and the Grenadines were “well

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<sup>130</sup> Similar to Article 53 of the Statute of the ICJ.



founded” and that Guinea must release the M/V *Saiga* promptly<sup>131</sup>. The Tribunal failed to explain precisely what the term meant or what criteria it was using to judge the claim to be well founded. To add to the lack of clarity, although not explicit, Judge Wolfrum and Judge Yamamoto seemed to be expressing the standard of proof in terms of the “preponderance of probabilities”. They articulated the view that the claim that the Respondent acted on the basis of article 73 of the Convention was not “preponderant”<sup>132</sup>.

#### 4.3.1 *The Saiga (No. 2) (Merits Phase)*:

The *Saiga (No. 2)* (1999) was the continuation on the merits of the prompt release case that had previously been before the Tribunal. The case was a dispute between St. Vincent and the Grenadines and Guinea, submitted jointly to the Tribunal. The *Saiga* was an oil tanker flying the flag of St. Vincent and the Grenadines which was arrested off the coast of West Africa by Guinea. The Guinean court found the Master of the *Saiga* guilty of illegally importing diesel oil, committing crimes of contraband, fraud and tax evasion. The Tribunal was asked to consider the full merits of all aspects of the case including damages and costs.

This case is the most important case regarding the issue of standard of proof to date, because it is the only case where the issue has been addressed directly. This was done by Judge Wolfrum in his Separate Opinion<sup>133</sup> which could be summarised into the following points.

Judge Wolfrum underlined the discretion that international tribunals enjoy in determining the standard of proof in a dispute. However, he emphasised the need for rules to be established for “it is a matter of justice”<sup>134</sup>. He commented that the judgment did not pinpoint the standard applied, but drew attention to Article 28 of the Statute that a claim must be well founded in fact and law. For the first time in the history of ITLOS, the standard in Article 28 was declared, in this case by Judge Wolfrum, to also be applicable to cases where both parties were present<sup>135</sup>.

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<sup>131</sup> *The Saiga Case*, ITLOS, 1997 Prompt Release, para 79

<sup>132</sup> *The Saiga Case*, ITLOS, 1997 Dissenting Opinion of Judge Wolfrum and Judge Yamamoto, para 9-10. Article 73 of the Convention concerns the enforcement of laws and regulations of the coastal state.

<sup>133</sup> *The Saiga Case (No. 2)*, ITLOS, 1999 Merits, Separate Opinion of Judge Wolfrum, para 9-14

<sup>134</sup> *The Saiga Case (No. 2)*, ITLOS, 1999 Merits, Separate Opinion of Judge Wolfrum, para 10

<sup>135</sup> The scope of Article 28 of the Statute only covers cases where one party is absent from the proceedings. Judge Wolfrum’s statement extended the scope of Article 28 of the Statute in the same way that the *Nicaragua Case* did on the corresponding article for the ICJ.

Later in his Opinion, Judge Wolfrum explained the different standards of proof: *prima facie* evidence, preponderance of evidence, and beyond reasonable doubt. He stated that “international courts or tribunals have not confined themselves strictly to these standards but have combined or modified them where justifiable under the circumstances of the respective case”<sup>136</sup>. He gave examples from this particular case where the Tribunal has applied the standard of proof in many ways. To conclude, Judge Wolfrum stated that “well-founded” in the sense of Article 28 of the Statute is “not a standard of proof in the sense of “preponderance of evidence”, it is rather comparable to the standard of proof in the sense of “proof beyond reasonable doubt” as applied in many national legal systems”<sup>137</sup>. However, in saying this, he referred to the work of Kazazi. The question arises as to whether this is a view shared by other members of the Tribunal.

Judge Wolfrum was very critical of the low standard of proof that the Tribunal was applying in relation to establishing the nationality of the *Saiga*. “The judgment does not consider it necessary to be satisfied of the Vincentian nationality of the *Saiga* but rather accepts the lack of proof for the contrary to be sufficient. This is irreconcilable with the standard of proof to be applied according to the Statute.”<sup>138</sup> The judge went on to say that if the standard of proof in the Statute were to be applied, then it has not been met by Guinea in its claims. This comment seems to suggest that, on this particular issue, the Tribunal was applying a particularly low standard.

Opinions of other judges have also given clues as to the applicable standard of proof. Judge Mensah seemed to be applying a standard of proof requiring convincing evidence. He stated that Guinea has provided this on the issue of the Registration of the *Saiga* and that Saint Vincent and the Grenadines has not contested to the evidence that has been produced<sup>139</sup>. In the oral pleadings, on the issue of the movements of the Guinean patrol boats and the *Saiga*, counsel for Guinea implied the same standard of proof. It argued that this had been “convincingly demonstrated before the Tribunal.”<sup>140</sup>

In addition, the standard of proof has also been merely expressed in terms of the sufficiency of the evidence. For example, Judge Anderson stated that the

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<sup>136</sup> *The Saiga Case (No. 2)*, ITLOS, 1999 Merits, Separate Opinion of Judge Wolfrum, para 12

<sup>137</sup> *The Saiga Case (No. 2)*, ITLOS, 1999 Merits, Separate Opinion of Judge Wolfrum, para 12

<sup>138</sup> *The Saiga Case (No. 2)*, ITLOS, 1999 Merits, Separate Opinion of Judge Wolfrum, para 14

<sup>139</sup> *The Saiga Case (No. 2)*, ITLOS, 1999 Merits, Separate Opinion of Judge Mensah, para 15

<sup>140</sup> *The Saiga Case (No. 2)*, ITLOS, 1999 Merits, Oral Proceedings, 16-03-99 am, 13

evidence needed to be “sufficient” and it is for the tribunal to decided whether the evidence has been so provided. He concluded in his Separate Opinion that there was insufficient evidence to establish that an order was given and received from the patrol vessels to the *Saiga*<sup>141</sup>. Regarding “overt signs of nationality” which were on the *Saiga*, the evidence on which Saint Vincent and the Grenadines had relied “do not constitute independent and sufficient evidence of registration”<sup>142</sup>. Again, the judge did not explain what he meant by “sufficient” evidence. The “sufficiency” standard was also mentioned by counsel of Guinea. It suggested that the evidence needed to be “sufficient” and challenged the claims of Saint Vincent and the Grenadines on the grounds that this was not the case<sup>143</sup>.

The Opinion of Judge Anderson also suggests the applicable standard of proof to be the “balance of probabilities”. He stated: “In conclusion on these questions of nationality and conduct, St. Vincent was able in my view to establish, on the balance of probabilities and having regard to the predominant role of the registering State in the matter of nationality, that the *Saiga* possessed Vincentian nationality on the relevant dates.”<sup>144</sup>

Regarding the nationality of the *Saiga*, in the opinion of many judges<sup>145</sup>, the Tribunal applied an unsatisfactorily low standard of proof. The Tribunal seemed to be applying a standard resembling *prima facie* evidence<sup>146</sup>. The Tribunal found that Saint Vincent and the Grenadines had discharged its initial burden of proof of the nationality of the *Saiga*, which was comparable to providing *prima facie* evidence. The burden of proof then shifted to Guinea to prove its case that the *Saiga* was not registered as such. Guinea was unable to prove this. The Tribunal hence concluded that the *Saiga* was of Vincentian nationality despite the fact that Saint Vincent and the Grenadines only proved its case at a *prima facie* level. Judge Warioba has expressed the view that the *prima facie* standard should not have been applicable.

If the Tribunal did actually apply the low *prima facie* standard in the way suggested by Judge Warioba, what could be reason for this? One explanation is that the Tribunal has mixed up two concepts: “burden of persuasion” and the “evidential burden”. Their distinction is to be found in the Common Law legal tradition.

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<sup>141</sup> *The Saiga Case (No. 2)*, ITLOS, 1999 Merits, Separate Opinion of Judge Anderson, 6

<sup>142</sup> *The Saiga Case (No. 2)*, ITLOS, 1999 Merits, Separate Opinion of Judge Mensah, para 14

<sup>143</sup> *The Saiga Case (No. 2)*, ITLOS, 1999 Merits, Oral Proceedings 20-03-99 am, 30

<sup>144</sup> *The Saiga Case (No. 2)*, ITLOS, 1999 Merits, Separate Opinion of Judge Anderson, 5

<sup>145</sup> See: *The Saiga Case (No. 2)*, ITLOS, 1999 Merits, Separate Opinion of Judge Mensah para 1-2, Dissenting Opinions of Judge Wolfrum para 1-45 and Warioba para 4-10.

<sup>146</sup> *The Saiga Case (No. 2)*, ITLOS, 1999 Merits, Dissenting Opinion of Judge Warioba, para 32-33

However, the details will not be addressed here but in the section on the WTO DSB where a similar scenario has taken place. In brief, such confusion will shift the burden of proof to the respondent instead of only the evidential burden, and lowering the standard of proof as a result.

The *Saiga (No. 2)* has illustrated that the question of the standard of proof of ITLOS is far from clear. There has been concern expressed by a number of judges regarding the suitability of the standard applied and whether there should be a clearer standard set out.

#### 4.3.2 After *Saiga (No. 2)*:

After *Saiga (No.2)*, the Tribunal did not address the issue of standard of proof in much detail. There were only clues as to the possible applied standard. In the *Monte Confurco Case*, the French Agent made a statement which could be interpreted as him having the standard of “beyond reasonable doubt” in mind. He said: “Now I shall confine myself merely to noting that these facts speak for themselves and leave no doubt about the absence of reasonable doubt. In other words, there is no reasonable doubt relating to the reality of the violations committed and on the particular seriousness which they possess”<sup>147</sup>. Does this statement mean that, to the parties, the Tribunal was applying this higher standard? Or was counsel uncertain and consequently having to argue to the higher standard?

In the prompt release case involving the Grand Prince, the Tribunal did not go into much detail about the standard of proof regarding the nationality of the vessel as it did with the *Saiga*. “Sufficient” evidence was the level of proof needed: “It is necessary that there is sufficient evidence to establish that a vessel is registered and, therefore, has the right to fly the flag of Belize at the relevant time.”<sup>148</sup> The question arises as to what is the relationship between this standard and the arguably low standard applied on a similar issue in *Saiga (No.2)*.

In its latest prompt release case, *The “Juno Trader” Case*, the Tribunal determined that the application for the prompt release was “well founded” referring to Article 73(2) of the Convention and that Guinea-Bissau must release the ship

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<sup>147</sup> *The Monte Confurco Case*, ITLOS, 2000 Oral Proceedings, 07-12-00 pm., 13-14

<sup>148</sup> *The Grand Prince Case*, ITLOS, 2001 Judgment, para 83

promptly<sup>149</sup>. The use of this phrase says little about the standard of proof itself. Counsel for Saint Vincent and the Grenadines suggested that the required evidence was that “enough to convince the Tribunal” or “convincing” to discharge the burden of proof<sup>150</sup>. The judgment does not offer any clarification.

#### 4.3.3 Preliminary Conclusions:

The jurisprudence of the tribunal to date has been limited on indicating the standard of proof applied. It has not shown that there is one standard. The most important case was the *Saiga (No. 2) Case* where the issue was debated. Judge Wolfrum expressed his concern that the standard of proof has not been clearly stated. Further, there was the question of whether the standard applied by the Tribunal in this case regarding the nationality of the vessel was suitable or too low.

#### 4.4 Interviews with the judges:

Regarding the question of what is the standard of proof applied by the Tribunal, the judges gave different answers. Most of the judges were hesitant to give a straight answer but had to take a few moments before arriving at the reply<sup>151</sup>. There was a mixture of responses. Some pointed to the fact that there is a lack of clarity and expressed the view that the Tribunal does not have general policy on the standard of proof, and that the issue has not been properly addressed by it<sup>152</sup>. Judge G and Judge H have said that the Tribunal does not apply a specific standard, and it very much depends on the case<sup>153</sup>. Some have expressed the view that the standard of the Tribunal has had most influence from the Civil Law tradition, and the standard applied would be one similar to the notion of the conviction of the judge. However, Judge E stated that the standard of proof applied most by the Tribunal was the preponderance of evidence<sup>154</sup>. Judge H said that, under normal circumstances, the Tribunal would apply the standard found in the provisions, the “well-founded” test.

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<sup>149</sup> *The Juno Trader Case*, ITLOS, 2004 Judgment, p. 26, para 80

<sup>150</sup> *The Juno Trader Case*, ITLOS, 2004 Oral Proceedings, 07-12-04 am, 20

<sup>151</sup> This confirms the fact that the Tribunal's standard of proof is far from clear.

<sup>152</sup> This is the view of Judge D. He further suggested that, at the beginning of the history of the Tribunal, this issue was not a concern with the members of the Tribunal. This view is shared by judge H. Judge J referred to the practice of the ICJ where the issue has not been addressed in its 60 year history. Judge I has said that the standard is not as strict as the domestic context.

<sup>153</sup> Judge G added he will avoid classifying the standard of the Tribunal in terms of a municipal standard as this can be misleading.

<sup>154</sup> However, he added that there were exceptions to this. Judge F also share this view.

Judge G was of the view that, in practice, the parties will not consider what standard of proof is applicable but present all the evidence available to the Tribunal, and that there is limited procedural tactics in international litigation compared to the municipal context.

Further, members of the Tribunal have also stated that the standard of proof can change. For example, Judge E has stated that the standard of proof is different for the merits phase and the jurisdiction phase. The standard applied at the jurisdiction phase is higher than the merits phase. The former would require a standard that is higher than the “preponderance of evidence”, but not as high as “beyond reasonable doubt”<sup>155</sup>. Judge I has also suggested that the urgency of the case can lower the standard of proof<sup>156</sup>. In addition, Judge E stated that the standard of proof can also shift with the seriousness of the case.

The question of whether the *status quo* is satisfactory also gave rise to a range of answers. Judge H was of the view that there is room for improvement. However, adopting too rigid a rule would not be feasible for international litigation which needs a level of flexibility<sup>157</sup>. Judge E expressed the opinion that the current rules, with a serious act demanding a higher standard, are satisfactory. Many judges said that the rules on the standard of proof need to be clearer<sup>158</sup>. This will introduce predictability and the parties would feel more comfortable before the Tribunal. There was also support for the flexible approach to the standard of proof<sup>159</sup>. The flexibility has not shown to be a hindrance to the work of the Tribunal so far<sup>160</sup>.

Judge F is a strong advocate for the Tribunal to address the problem of the lack of clarity of the standard of proof. He has stated that clear rules are needed both by the Tribunal and the parties. Further, the lack of clear rules could be one reason explaining the small number of cases before the Tribunal. States could be discouraged because of the unpredictability.

As for the factors that affect the approach on the standard of proof, as well as other areas of evidential rules, the judges have said that their own background and experience have played a role. Judge E has suggested that this is at the back of the minds of the judges. Other factors influencing the approach of the Tribunal include

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<sup>155</sup> In his opinion, the word “satisfy” used in the provisions establishing jurisdiction is more than the preponderance of evidence.

<sup>156</sup> The standard of proof is not as strict as the domestic context.

<sup>157</sup> He has suggested that Tribunal should establish guidelines which the judges could use.

<sup>158</sup> Judge H has stated that the rules as it currently stands have no fundamental floors. It does not hinder the decision making process. However, it would be beneficial to address the issue.

<sup>159</sup> The problem of unpredictability which accompanies flexibility was also acknowledged, .e.g by Judge G, Judge J

<sup>160</sup> Judge J

its own past practice, and the practice of other international tribunals, especially the ICJ. One judge has commented that the lack of rules is a result of a clash of legal cultures, and it is difficult to formulate rules which will suit everyone<sup>161</sup>. Another has raised the question of whether the Tribunal is trying not to offend parties by avoiding the establishment of rules which could be an arrangement the parties are not used to<sup>162</sup>.

A number of the judges also pointed out two problems which they have to face in dealing with the issue of the standard of proof: the lack of time and the lack of evidence<sup>163</sup>. There has also been an observation made by some of the judges that, even if the rules on the standard of proof have been clearly stated, their application can still be a subjective process<sup>164</sup>. For example, what satisfies the applied standard to one judge might not to another.

What these interviews have shown are four important points. First, there is yet to be an agreed applied standard of proof for the Tribunal, even among the judges themselves. It does not seem to be an issue which has been addressed in detail. Second, some judges have expressed the opinion that the standard can shift. This can depend on: a) the nature of the case, b) the stage in the proceedings of the case, c) the urgency of the case. Third, there is substantial support by more than half of the judges interviewed for the adoption of clearer rules. Some are of the opinion that the rules must not be too rigid, others think that the flexible approach of the Tribunal has not so far been a hindrance. Fourth, many factors can influence the approach of the Tribunal. They include the background of the judges, the mix of legal cultures and the deference to States.

#### 4.5 Concluding Remarks:

The jurisprudence and the interviews have shown that the Tribunal's standard of proof is not clearly set out. Similar to the ICJ, the Tribunal and the judges use a

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<sup>161</sup> Judge H

<sup>162</sup> Judge F

<sup>163</sup> Judge D was concerned with both issues. Judge G expressed concern for the difficulty in applying a standard under time pressure.

<sup>164</sup> Judge E and Judge H share this view.

range of standards and one standard cannot be singled out. The standards vary from case to case<sup>165</sup>, and from judge to judge.

In terms of its jurisprudence, an important key to understanding ITLOS's approach on the standard of proof is Judge Wolfrum's separate opinion. He draws attention to Article 28 of the Statute which requires that "the claim must be well founded in fact and law". Although he did explore the different standards that are available, he never gave a more precise definition with regard to the standard of the Tribunal.

From the interviews, it can be seen that the issue of the standard of proof is still unclear for the judges of the Tribunal. Different judges have expressed different standards, from the Common Law notion of preponderance of evidence to the Civil Law notion of the conviction of the judge. Some of the judges had commented that the standard of proof can shift in relation to the circumstances of the case, which would be similar to the ICJ.

Factors influencing the approach of the Tribunal include the background of the judge and the difficulty in reconciling the many different legal cultures. These issues will be explored further in the overall conclusion with all the factors, including those in the other two tribunals.

As observed by many of the judges during the interviews, ITLOS is still a very young tribunal, its only full merits cases being *Saiga (No. 2)*. With more cases to appear before the Tribunal, the new jurisprudence will certainly reveal more on the issue of the standard of proof.

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<sup>165</sup> Many judges have criticized the low standard of proof applied in the *Saiga (No. 2)* Case. See: Chapter 4, Section 4.3.1, 97-100 and 4.4, 101-103



## Section 5: The WTO DSB:

### 5.1 Introduction:

The WTO Dispute Settlement Body (WTO DSB) is relatively new. It was created by the Uruguay Round agreement as an improvement on the old GATT dispute settlement system which had many flaws. The new system introduces a well structured mechanism for dealing with disputes that could arise under the WTO agreement. Within the context of the WTO, the standard of proof will play an increasingly important role because of the importance of evidence and the very scientific nature of the cases.

This section will examine the relevant instruments of the WTO DSB and its jurisprudence. Because the number of cases is vast, this section will focus on the most relevant cases and those which have reached the Appellate Body (AB).

### 5.2 The Provisions of the WTO DSB:

The WTO DSB is governed by several instruments: the Dispute Settlement Understanding (DSU), the Rules of Conduct on rules and procedures for settling disputes<sup>166</sup>, and the Working Procedures for Appellate Review.

The DSU lays down rules for both the panels and the AB but nothing addresses the issue of the standard of proof. The rules mostly concern the setting up of the dispute settlement system and its working time frame. The DSU includes the Working Procedures (Annex 3) which contain rules on the panels but not the standard of proof.

The Rules of Conduct do not explain the DSB's standard of proof, but concerns the possibility of a conflict of interest among its members: the panellists, the arbitrators, the experts, the secretariat, and the Appellate Body staff.

The Working Procedures for Appellate Review do not address the standard of proof either. It concerns many aspects of the appeal system including the duties and responsibilities of the Members of the AB, the procedure for submitting an appeal, the time frame of an appeal, and procedures for the proceedings. However, the Working

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<sup>166</sup> Adopted in December 1996

Procedure for Appellate Review does provide for the Appellate Body to adopt rules for cases at hand and where a particular aspect of the proceedings has not been covered by the DSU and other provisions<sup>167</sup>. There is a possibility that the standard of proof can be adopted under this provision.

### 5.3 The Jurisprudence of the WTO DSB:

The jurisprudence of the WTO has addressed the issue of the standard of proof to an extent. However, the issue is very much intertwined with the rules on burden of proof, making the understanding of one crucial to the understanding the other. This situation is unique to the WTO because of the way in which the WTO DSB has interpreted the notion of burden of proof. It has confused the burden of proof with the evidential burden, two concepts found in the Common Law tradition. This will be explained more thoroughly later in the section.

#### 5.3.1 Each party must prove its claim:

Since the early stages of the DSB, it was made clear that the burden of proof was on the complainant. For example, this was expressed in the *Japan – Alcohol Case*, a dispute about the import of foreign alcohol into Japan and whether foreign alcohol had received treatment equal to local produce. In this case, on the claim according to Article III:2 of GATT, *first sentence*, and on the question of whether the products are like, the panel ruled that the “complainants have the burden of proof to show first, that products are like and second, that foreign products are taxed in excess of domestic ones”<sup>168</sup>. The panel also took similar views with the claim under Article III:2, *second sentence*, on the issue of whether the goods are directly competitive.

Similar to the requirement for the complainant to prove their claim, the respondent must also do the same for any exceptions that they intend to rely on. In the *USA – Shirts and Blouses Case*, a case brought by India against the United States that the safeguard imposed on imports of woven wool shirts and blouses was not compatible with Articles 2, 6 and 8 of the Agreement on Textiles and Clothing (ATC), the AB stated that it is the “rules that the party who asserts a fact, whether the

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<sup>167</sup> Part II, Article 16

<sup>168</sup> *Japan - Alcohol Case*, WTO DSB, 1996 para 6.14

claimant or the respondent, is responsible for providing proof thereof.”<sup>169</sup> In addition, the AB has confirmed that “the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence”<sup>170</sup>. In the *USA – Underwear Case*, the panel stated that “the party which invokes an exception in order to justify its action carries the burden of proof that it has fulfilled the conditions for invoking the exception”<sup>171</sup>.

### 5.3.2 The two stage test, presenting a *prima facie* case and rebutting it:

At first, the rules on the burden of proof mentioned seem to be quite straight forward and not particularly relevant to the standard of proof. However, what was crucial was the introduction of the requirement for the complainant to present a *prima facie* case to the DSB, which is the first stage of the two stage test<sup>172</sup>.

Initially, it was the parties, especially the United States, who argued that the complainant needed to present a *prima facie* case. And once this was done, it was then for respondent to rebut this claim by providing sufficient evidence. In other words, the “burden of proof” would shift from the complainant to the respondent to rebut the *prima facie* case. This is the second stage in the test.

In the *Japan – Alcohol Case*, the USA argued that “it is up to the complainant to produce a *prima facie* case that an origin-neutral measure has both the aim and the effect of affording protection to domestic production [under GATT Article III:2, first sentence].”<sup>173</sup> The United States also took this line of argument in the *USA – Underwear Case*, suggesting that the burden of proof was on Costa Rica to present the evidence showing a *prima facie* case that the United States had not conformed to Article 6.2 and 6.3 of the ATC<sup>174</sup>.

The mechanism requiring the complainant to present a *prima facie* case and then the burden shifting to the respondent to rebut that allegation was confirmed by the panel in the *USA – Shirts and Blouses Case*. It said that “since India is the party that initiated the dispute settlement proceedings, we consider that it is for India to put

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<sup>169</sup> *USA – Shirts and Blouses Case*, WTO DSB, 1997, Appellate Body Report, para 4

<sup>170</sup> *USA – Shirts and Blouses Case*, WTO DSB, 1997, Appellate Body Report, para 4

<sup>171</sup> *USA – Underwear Case*, WTO DSB, 1997 Panel Report, para 7.16

<sup>172</sup> For a fuller explanation of why this *prima facie* approach was established, see: Pauwelyn, (1998) 244-246

<sup>173</sup> *Japan – Alcohol Case*, WTO DSB, 1996 Panel Report para 4.32

<sup>174</sup> *USA – Underwear Case*, WTO DSB, 1997 Panel Report, para 5.41 and 5.67

forward factual and legal arguments...”<sup>175</sup> In addition, the panel went on to say that “it was for India to submit a *prima facie* case of violation of the ATC, namely, that the restriction imposed by the United States did not respect the provisions of articles 2.4 and 6 of the ATC. It was then for the United States to convince the Panel that, at the time of its determination, it had respected the requirements of Article 6 of the ATC.”<sup>176</sup>

During the appeal stage of this case, the AB also confirmed this two stage test. However, it expressed the notion of a *prima facie* case in terms of creating a presumption. The AB said: “If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut that presumption.”<sup>177</sup>

This two stage approach to presenting evidence has been used many times. In the *India – Patent Case*, concerning the TRIPS agreement and the lack of patent protection for agricultural and pharmaceutical chemical products in India, the AB referred to the judgment in the *USA – Shirts and Blouses Case* and said that “in this case, it is the United States that claims a violation by India of Article 70.8 of the TRIPS Agreement. Therefore, it is up to the United States to put forward evidence and legal arguments sufficient to demonstrate that action by India is inconsistent with the obligations assumed by India under Article 70.8”<sup>178</sup>. The AB ruled that the United States had been successful in proving its case, and it is for India to rebut this claim.

The two stage test has not only been used during the earlier period of the life of the DSB but also recently. For example, this test was used in: (a) the *USA – Anti-Dumping Act of 1916 Case* where the AB said that the Panel had correctly applied the burden of proof. The EC and Japan have satisfied their burden of proof by establishing a *prima facie* case that the 1916 Act was inconsistent with Article VI of GATT 1994, and it was up to the United States to produce evidence to rebut this<sup>179</sup>, (b) the *EC – Trade Descriptions of Sardines Case*<sup>180</sup> (c) the *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products Case*, even though it concerned special circumstances where the burden of proof would be

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<sup>175</sup> *USA – Shirts and Blouses Case*, WTO DSB, 1997 Panel Report, para 7.12

<sup>176</sup> *USA – Shirts and Blouses Case*, WTO DSB, 1997, Panel Report, para 6.7

<sup>177</sup> *USA – Shirts and Blouses Case*, WTO DSB, 1997, Appellate Body Report, para 4

<sup>178</sup> *India-Patent Case*, WTO DSB, 1997 Appellate Body Report, para 73

<sup>179</sup> *USA – Anti-Dumping Act Case*, WTO DSB, 2000, Appellate Body Report, para 96-97

<sup>180</sup> *EC-Sardines Case*, WTO DSB, 2002, Appellate Body Report, 75-82

allocated differently<sup>181</sup>, the AB made an effort to reaffirm the two stage test which would apply normally.

There have also been cases where the allocation of the burden of proof, and in turn, the standard of proof has not been in accordance with the two stage test, such as the *USA – Subsidies on Upland Cotton Case*, where article 10.3 of the Agreement on Agriculture changed the allocation of the burden of proof. Article 9 of the Agreement provides for the export subsidy commitments of the Member States. Article 10 concerns the prevention of circumvention of the export subsidy commitments and article 10.3 requires that the “Member that claims that any quantity exported in excess of a reduction commitment level is not subsidized must establish that no export subsidy...has been granted in respect of the quantity of exports in question”. In other words, the burden of proof was on the defendant to prove that there has been no subsidy to the export in question. However, in such cases where there were special circumstances that differed from the two stage test, this has been duly noted by the DSB<sup>182</sup>.

### 5.3.3 The effects of the two stage test:

The two stage test has implications on the standard of proof of the WTO DSB. The definition of a *prima facie* case is crucial to understanding how the standard of proof is affected.

The requirement of a *prima facie* case is explicit in the jurisprudence of the WTO, but its precise meaning is not as clear. The plain meaning of the term “*prima facie*” indicates that the complainant must provide enough proof so that, *at first sight*, their claim would be upheld. This is a low standard.

However, there is still a degree of uncertainty in the definition. The DSB has enunciated on the definition of “*prima facie*” in the *USA – Shirts and Blouses Case*. The AB said “precisely how much and precisely what kind of evidence will be required to establish such a presumption [or a *prima facie* case] will necessarily vary from measure to measure, provision to provision, and case to case”<sup>183</sup>. Hence, the decision of whether enough evidence has been produced to constitute a *prima facie* case is at the discretion of the panellists or AB members.

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<sup>181</sup> *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products Case*, WTO DSB, 2002, 16-22

<sup>182</sup> *USA - Subsidies on Upland Cotton Case*, WTO DSB, 2005, 241-249 Appellate Body Report

<sup>183</sup> *USA - Shirts and Blouses Case*, WTO DSB, 1997, Appellate Body Report, para 4

In addition, the panel has ruled in the *EC- Hormones Case* that if the *prima facie* case of the complainant is un rebutted, then the case would go in favour of the complainant. The panel said “it is for the United States to present factual and legal arguments that, if un rebutted, would demonstrate a violation of the SPS Agreement. Once such a *prima facie* case is made...the burden of proof shifts to the responding party”<sup>184</sup>. This was also later confirmed by the AB<sup>185</sup>.

As a result, in practice, the overall standard of proof for the complainant has been lowered to the same level as that required to establish a *prima facie* case. If the responding party does not provide evidence to rebut the claim, the case can be concluded in favour of the complainant merely on that initial evidence alone. This view concurs with that of Pauwelyn: “Indeed, by adopting the presumption technique, the tribunal no longer requires conclusive evidence (or proof beyond reasonable doubt or whatever other standard of proof) of an alleged fact; it will be enough to create a non-rebutted presumption of truth.”<sup>186</sup> The complainant has a low standard of proof to satisfy, much lower than what might be expected in cases before the WTO DSB.

This low standard of proof was confirmed in the *Japan - Measures Affecting Agricultural Products Case*. In the panel report, it stated: “In our view, the *prima facie* case to be established in a WTO dispute settlement proceeding relates to the substantive issue of what a party invoking a fact or claim needs to prove for that fact or claim to be accepted by a panel; that is, evidence (1) which is sufficient to raise a presumption that the alleged fact or claim is correct and (2) that has not been sufficiently rebutted by the opposing party. ...we consider that we are called upon to examine and weigh all the evidence validly submitted to us...”<sup>187</sup>

In the recent *United States - Measures Affecting the Cross-border Supply of Gambling and Betting Services Case*, the standard of a *prima facie* case was further explained by the AB. “The evidence and arguments underlying a *prima facie* case, therefore, must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision.”<sup>188</sup> These requirements imply a low standard of proof.

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<sup>184</sup> *EC - Hormones Case*, WTO DSB, 1997 Panel Report, para 8.54

<sup>185</sup> *EC - Hormones Case*, WTO DSB, 1997 Appellate Body Report, para 98

<sup>186</sup> Pauwelyn. (1998) 256

<sup>187</sup> *Japan - Agricultural Products Case*, WTO DSB, 1999, Panel Report, para 7.10

<sup>188</sup> *USA - Gambling and Betting Services Case*, WTO DSB, 2005 Appellate Body Report, para 141

In contrast to the low standard of proof that the complainant must satisfy, the respondent faces a higher standard. In the *USA – Shirts and Blouses Case*, the panel said that once the burden has shifted to the respondent, then they must provide enough evidence to “rebut” the presumption created by the complainant. But what does this mean? Not much guidance has been given by the DSB. Pauwelyn has suggested that the required standard is only one which casts a “reasonable doubt” on the evidence constituting the presumption since the respondent only needs to “rebut” it<sup>189</sup>.

However, the writer offers a different interpretation of the burden upon the respondent. The need for the respondent to rebut the presumption sets a relatively high standard of proof. To “rebut” is to claim or prove to be false. This cannot be done by merely casting “reasonable doubt” on the presumption, but requires a higher standard. In addition, the cases of the WTO DSB have not indicated a lower standard of just casting a reasonable doubt upon the presumption. For example, in the *EC – Hormones Case*, it was stated that the EC must “demonstrate that its measures in dispute meet the requirement imposed by the SPS Agreement.”<sup>190</sup> This seems to be a standard higher than casting reasonable doubt on the presumption.

The writer’s view concurs with that of Christoforou. He has noted that the respondent bears a higher standard of proof than the complainant: “The burden of proof standard applied by WTO panels and the Appellate Body requires a very low degree of confidence, because it is sufficient for the complaining member to raise only a presumption that its products are “safe” or pose no risk.”<sup>191</sup> The defending member then must meet a much higher burden in order to eliminate the likelihood of an erroneous judgment on the scientific aspects of the case.<sup>192</sup> This standard is unsatisfactory.”<sup>193</sup> The writer agrees with Christoforou on the inappropriate standard applied. The standard of proof of the claimant should be the same as the respondent’s.

This double standard of proof has been noted by the parties in the jurisprudence. In the *Korea – Taxes on Alcoholic Beverages Case*, Korea indicated to the AB that the complainant bore a standard much lower than the respondent: “The Panel was far more exacting when looking at evidence submitted by Korea than when considering evidence brought by the complainants. The Panel, in effect, applied a

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<sup>189</sup> Pauwelyn, (1998) 257

<sup>190</sup> *EC - Hormones Case*, WTO DSB, 1997, Appellate Body Report, para 8.55 and 8.57

<sup>191</sup> *Japan - Agricultural Products Case*, WTO DSB, 1999 See Appellate Body Report at para 137

<sup>192</sup> *Japan - Agricultural Products Case*, WTO DSB, 1999 See Appellate Body Report at para 121-24

<sup>193</sup> Christoforou, (2000) 644

“double standard of proof”<sup>194</sup>. In addition, concerning the price of the local goods in comparison to the foreign goods, Korea said that “The Panel...wrongly allocated the burden of proof and also applied a “double standard” since it was lenient with the complainants’ evidence, but strict with Korea’s rebuttal evidence.”<sup>195</sup> In response, the AB did not address the issue of the double standard. It concluded that the Panel had not erred on this procedural issue but had relied on the test that was established in the *USA – Shirts and Blouses Case*, and that the Panel had understood the test therein. The Panel was correct to apply the “prima facie case test” and to rule that it could only make findings under Article III:2, *second sentence*, only with respect to products for which a *prima facie* case has been made out on the basis of the evidence presented.

The two stage test has been used without much transparency and the WTO DSB has not guided the parties through the complex mechanisms of the proceedings. In the *Thailand – Anti-Dumping Case*, Thailand argued that “the Panel failed to make, either expressly or implicitly, the required findings regarding whether Poland had indeed presented a *prima facie* case and whether Thailand had effectively refuted such case”<sup>196</sup>. However, the AB referred to its ruling in the *Korea – Dairy Safeguards Case* which stated that the Panel need not make an “explicit ruling on whether the complainant has established a *prima facie* case of violation before a panel may proceed to examine the respondent’s defence and evidence.”<sup>197</sup> The AB then referred to the *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products Case*, and added that the Panel is not “required to state expressly which party bears the burden of proof in respect of every claim made.”<sup>198</sup>

The opinion of the writer is that the WTO dispute settlement system should encourage more transparency. This would in turn promote its own efficiency and the ultimate aim of Member States fulfilling their obligations. A transparent and fair dispute settlement system would earn the trust and confidence of the Member States in the WTO framework as a whole.

#### 5.3.4 An alternative suggestion, the respondent presenting a *prima facie* case:

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<sup>194</sup> *Korea – Taxes on Alcoholic Beverages Case*, WTO DSB, 1998 Appellate Body Report, para 19

<sup>195</sup> *Korea – Taxes on Alcoholic Beverages Case*, WTO DSB, 1998 Appellate Body Report, para 33

<sup>196</sup> *Thailand – Anti-Dumping Duties Case*, WTO DSB, 2001 Appellate Body Report, para 131

<sup>197</sup> *Korea – Dairy Safeguards Case*, WTO DSB, 2000 Appellate Body, para 145

<sup>198</sup> *India – Quantitative Restrictions Case*, WTO DSB, 1999 Appellate Body Report, para 137



The two stage test examined above requires the complainant to present a *prima facie* case and the respondent to rebut that presumption. However, in the *Dominican Republic – Measures affecting the Importation and International Sale of Cigarettes Case*, China, acting as a third party in this dispute suggested an alternative arrangement on the burden of proof. It was suggested that the respondent, when relying on an exception to a WTO obligation such as Article XX, must present a *prima facie* case. After this has been done, the burden of proof will then shift to the complainant to rebut it<sup>199</sup>. This is the reverse of what has been seen in the jurisprudence and would also lower the standard of proof of the respondent to *prima facie* evidence. However, this suggested approach has not been endorsed by the WTO DSB.

#### 5.4 An alternative view on the standard of proof:

Christoforou has suggested an alternative to the two stage test mentioned above, and that the standard of proof is not as low as previously indicated. This alternative view is based on the fact that the DSB has relied on both the evidence provided by the parties and that from scientific experts appointed under their authority. The DSB is free to pick and chose the scientific evidence before them. Christoforou has suggested that this procedure would lead to a standard that coincides with the Civil Law tradition of requiring enough facts to convince the judge. However, he notes that the standard applied by the DSB would relate more closely to the Common Law notion of the preponderance of the evidence because the DSB is essentially weighing up the evidence to decide which claim is the more convincing<sup>200</sup>.

Despite Christoforou's view, the writer is still of the opinion that the two stage test is the one applied. This conclusion is supported by the numerous occasions where the two stage test has been confirmed by both the Panels and the AB, despite instances where parties have indicated otherwise.

In the *Korea – Dairy Products Case*, the panel made a statement that suggested that standard of proof was one that resembled "preponderance of evidence". After stating the two stage test, the Panel went on to say: "As a matter of law the burden of proof rests with the European Communities, as complainant, and does not

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<sup>199</sup> *Dominican Republic - Cigarettes Case*, WTO DSB, 2005 Appellate Body, para 49

<sup>200</sup> Christoforou, (2000) 642-643

shift during the panel process. As a matter of process before the Panel, the European Communities will submit its arguments and evidence and Korea will respond to rebut the EC claims. At the end of this process, it is for the Panel to weigh and assess the evidence and arguments submitted by both parties in order to reach conclusions as to whether the EC claims are well-founded.”<sup>201</sup> Korea argued that the Panel skipped a stage in the proceedings, not stating whether the *prima facie* test has been reached and instead balancing the evidence that was before them. The AB did not address the issue whether this balancing act was correct, but reaffirmed the two stage test and added that it was not necessary for the Panel to enunciate when a *prima facie* case has been established<sup>202</sup>.

### 5.5 Interviews with the panelists:

Compared to the other two previous tribunals, the issue of the standard of proof in the WTO DSB is relatively settled. The three panelists interviewed agree that the rule applied is the two stage test: the complainant presenting a *prima facie* case, and the respondent rebutting it. Panelist L underlined the fact that the panelists are not entitled to adopt policy on their own accord. The rules to be followed are already set out either in the DSU or jurisprudence. The panelists apply the existing rules and are careful not to exceed what has been stipulated by the AB.

Panelist M noted, however, that even though the two stage mechanism is applied, in his view, panelists do look at the overall case and apply the Civil Law notion of the conviction of the judge in determining the final outcome<sup>203</sup>. Panelist K added that the standard, even though the two stage test is applied, is not as precise as such. It is up to the panelists to use his intuition to decide whether there is strong case. Further, in exceptional cases where issues resembling fraud have arisen, Panelist K has indicated that panelists would be inclined to impose a higher standard than usual.

Concerning the standard the claimants have to meet, all three panelists confirm that they must meet the *prima facie* standard. Panelist M added that it is rare for the standard not to be met. Although Panelist K agrees with this view for the most part,

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<sup>201</sup> *Korea - Dairy Safeguards Case*, WTO DSB, 2000 para 143. The process of weighing the evidence from the two sides suggests the application of the Common Law standard of the “preponderance of evidence”.

<sup>202</sup> *Korea - Dairy Safeguards Case*, WTO DSB, 2000 para 145

<sup>203</sup> He further added that the Civil Law standard of the conviction of the judge is more subjective than the Common Law standards.

he also indicated that in cases where the evidence involved is confidential, it could be very difficult for the claimants to satisfy this standard.

Another significant fact learnt from the interviews concerns the standard the respondent must meet in rebutting the complainant's *prima facie* case. Panelist L has said that the standard applicable to the respondent was the criminal Common Law standard of beyond reasonable doubt. Panelist K added that the respondent has to meet a high standard in rebutting the claim of the complainant. However, he did not enunciate further what this standard was.

Regarding the question of whether the current arrangement on the standard of proof was satisfactory, Panelist L thinks that it functions well when applied consistently. However, Panelist M is of the view that the current rules still lack clarity. He would like this issue to be addressed in a formal way resulting in a clearer set of rules. Panelist K has also indicated that the WTO DSB would benefit from clearer rules granting more predictability to the parties and the panelists themselves.

Further, there are many factors that could have an influence on the approach on the standard of proof. First, in contrast to the other two tribunals examined, the panelists very often include non-lawyers. Panelist L has indicated that the non-lawyer panelists were not concerned about technical rules such as the standard of proof. Second, Panelist L has noted that the panelists rely on the Secretariat for help<sup>204</sup>. The Secretariat can hence have influence on the way in which the panelists interpret the existing rules on the standard of proof. Third, Panelist L gets an impression that the AB, in dealing with procedural rules, is facing a clash of the different legal cultures of the parties and trying to avoid any conflicts that might arise from it. This could be a reason why the rules have not been spelt out in the provisions. Another reason for the lack of rules in the provisions was suggested by Panelist M: the WTO's focus is on the settlement of the trade dispute rather than the adjudication process. The WTO DSB is not yet a formalized "tribunal" like the other two.

The interviews of the three WTO Panelists have been revealing. The two stage test mentioned in the jurisprudence was confirmed. However, there were also suggestions that, when looking at the case as a whole, the panelists also applied the Civil Law standard of the conviction of the judge. Two panelists elaborated on the two stage test saying that the standard which the respondent must meet to rebut the

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<sup>204</sup> The role of the secretariat in the WTO is much more prominent than those at the ICJ or ITLOS.

*prima facie* claim of the complainant is a high one. Two of the three panelists interviewed called for a clearer set of rules. Factors which could have had an effect on the rules on the standard of proof include<sup>205</sup>: a) the help from the Secretariat, b) the reconciliation of the different legal cultures, c) the focus of the WTO on the settlement of the dispute rather than being an adjudicating body.

## 5.6 Concluding Remarks:

Compared to the other two tribunals, the WTO DSB has applied a consistent standard of proof: the two stage test. This requires the complainant of a WTO breach to present a *prima facie* case, and it is for the respondent to rebut it. This procedure sets up a double standard of proof where, in practice, the complainant only has to meet a low standard (*prima facie*) and the respondent has to meet a higher one. According to two panellists, this standard is high. One suggested that it is the Common Law standard of beyond reasonable doubt.

Two of the panelists interviewed had indicated for a need of clearer rules. There were also suggestions as to the factors that could have contributed to the WTO DSB's approach on the standard of proof. One reason for the more consistent approach probably stems from the existence of the AB which can overlook all the cases to establish a degree of uniformity.

The reason why the WTO DSB has adopted the two stage test is not clear. There seems to be confusion on the distinction between the "burden of proof" and the "evidential burden", the two types of burden that exist in the Common Law tradition. In the municipal context, the complainant has to present a *prima facie* case before the "evidential burden", *not* the burden of proof, shifts to the respondent. The burden of proof is the burden of persuasion that the party bears to prove the case to the Court and stays with that party, while the evidential burden is the burden to present the evidence to the Court which can shift between one party to another in a particular proceeding<sup>206</sup>. Indeed, the way of the Common Law tradition seemed to be what the panel in the *Korea – Dairy Products Case* was suggesting, but the AB dismissed it,

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<sup>205</sup> Unlike the ICJ and ITLOS, the background of the panelists does not seem to have such an effect on the rules on the standard of proof. This could be because the WTO panelists are not permanent and the limited role the panelists play in determining the approach on the standard of proof.

<sup>206</sup> Dennis, (2002) Chapter 11

and applied the two stage test that it had established before<sup>207</sup>. The WTO DSB has turned the Common Law notion of “evidential burden” into a burden of proof. As a result, the actual burden of proof shifts from one party to another, lowering the standard of proof for the complainant and applying different standards to different parties. Unfortunately, the WTO DSB has persisted to apply this standard of proof, therefore establishing consistency, but raising questions on the adequacy of the standard of proof.

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<sup>207</sup> *Korea - Dairy Safeguards Case*, WTO DSB, 2000 para 143.

## Section 6: Overall conclusion:

After the examination of the three tribunals, the general thesis will be addressed here: a) whether there is a common approach to the standard of proof among the selected tribunals, b) what are the factors influencing the approach of the tribunals, c) whether there should be a common set rules on the standard of proof.

### 6.1 The existence of a common approach:

There is no general common approach on the standard of proof between the three selected tribunals. However, there are some similarities worth noting. The approach of the ICJ and ITLOS resemble one another while the WTO DSB has applied a consistent different standard. The standards of proof of the ICJ and ITLOS have been unclear and can vary from case to case. They both apply a standard which can shift according to the nature of the case, but have not been explicit in the way this is done. On the other hand, the WTO DSB has applied a relatively precise standard of the two stage test requiring the claimant to prove a *prima facie* case, and then the respondent to rebut it. There is yet to be an emerging common body of law on the issue of the standard of proof.

### 6.2 Factors influencing the approach on the standard of proof:

This section will begin to indicate the reasons behind the approach on the standard of proof. However, because different aspects of evidential rules can be influenced by similar factors, the detailed study will be left to the overall conclusion of the thesis where there will also be the benefit of a comparative analysis<sup>208</sup>.

The nature of the cases has an influence on the standard of proof. First, the judges of the ICJ and ITLOS have suggested that the standard of proof can shift according to the seriousness of the case. The more serious the nature of the case, the higher the standard applied. However, the judges have been unclear as to the definition of a serious case and precisely what standard is applicable. The seriousness

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<sup>208</sup> See: Chapter 7, Section 3, 257-265

of State liability to the extent that could aid to clarify this question has not been addressed elsewhere either.

Second, the range of the cases can have an impact. Because the ICJ's jurisdiction is universal covering all types of disputes, it would arguably need a range of standards of proof to suit the different types of cases. Although with a narrower jurisdiction, ITLOS still rule on a range of cases: full merits cases, provisional measures cases, and prompt release cases. On the other hand, the WTO only deals with cases on barriers to trade on their merits. This distinction could explain the different approaches of the tribunals.

Third, an influencing factor on the approach on the standard of proof is the deference to States. This has been expressed in the context of ITLOS and the WTO DSB, and could explain the lack of more explicit rules in all three tribunals. The tribunals have to deal with a clash of legal cultures. In response, this could have arguably resulted in a lack of more concrete rules in order not to offend States which might not be used to the adopted rules<sup>209</sup>. The ICJ and ITLOS arguably have more deference to States than the WTO DSB. They have few rules on the standard of proof. This is in contrast with the WTO DSB which has established rules and precise timetables on how disputes can be solved in a regulated manner. The difference in the level of deference might result from the context in which the tribunals were created and the nature of the tribunals themselves<sup>210</sup>.

The history of each tribunal is the fourth factor that can affect the approach on the standard of proof. For example, this explains the likeness of ITLOS's rules to the ICJ's rules, the former being based on the latter. Upon its creation, ITLOS, perhaps also because it was created under the UN framework, looked to the ICJ for its rules. As for the WTO DSB, it was created to have compulsory jurisdiction and even enforcement powers with the goal of achieving quick and efficient settlement. It is this context that can explain why its procedures are more rigid.

The fifth and important factor influencing the approach of the standard of proof is the judges: the number of judges, and the expertise and background of the judges<sup>211</sup>. Because there is a big difference between the number of judges on each tribunal, from 3 at the WTO AB to 21 at ITLOS, this can affect the outcome on the

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<sup>209</sup> From the perspective of the tribunals, more deference to States could also encourage States to use their forum.

<sup>210</sup> See: Chapter 7, Section 3.7, 262, and 3.12, 264. Much deference was granted in the earlier part of this century and arguably becoming less so at current times.

<sup>211</sup> See: Chapter 7, Section 3.1, 257-259

standard of proof. A larger body of judges will find it more difficult to arrive at an agreement especially one that is as technical as the standard of proof. This could help to explain why the ICJ and ITLOS have not been explicit on the standard of proof in contrast to the WTO. The difficulty in agreement is also shown in the various Dissenting Opinions in cases before the ICJ and ITLOS regarding this issue. The background of the judges can also play an important role. From the interviews, judges/panelists from all three tribunals have stated that their background do influence the standard of proof. There is the Civil/Common Law divide where the judges of the former tradition will apply the vaguer test of the conviction of the judge whereas their counterparts prefer clearer Common Law style rules.

The sixth reason which has had an effect on the approach on the standard of proof is the existence of the AB in the WTO system. The AB can ensure the thorough revision of the rules and their consistency. This is not possible in the ICJ or ITLOS, and raises questions of whether their rules would have been more explicit and consistent if there were a similar two-tier system.

### 6.3 Should there be a common approach on the standard of proof?:

Another underlying question of this chapter is whether there should be a common approach on the standard of proof. However, this issue will be better understood if all three aspects of evidential rules examined in this thesis are taken together. The ultimate question would be: should there be a common set of rules on evidence? Consequently, this section will only give a brief introduction to the debate, especially that concerning the standard of proof, and will leave the details to the conclusion of the thesis<sup>212</sup>.

The first point, albeit obvious, is that the standard of proof is important to the outcome of a dispute. For example, the party might possess only enough evidence to satisfy the standard of proof of “preponderance of evidence” but not “beyond reasonable doubt”. The dispute could turn on a technical matter such as this. As suggested by many of the judges interviewed, this calls for clarity in the rules. Clarity will in turn lead to predictability and transparency.

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<sup>212</sup> See: Chapter 7, Section 4, 265-213



With the increasing number of international tribunals, there will be more overlapping jurisdictions. For example, the ICJ and ITLOS have overlapping competence over disputes arising from UNCLOS. There is potential for the same issues in the same dispute to appear before the two tribunals. The standard of proof applied should be the same in such cases to ensure that the same disputes result in the same outcome.

However, the differing nature of the tribunals must also be taken into consideration. A forum such as the ICJ with universal jurisdiction could demand a flexible standard of proof, and a specialised tribunal such as the WTO might function better with its own specific standard.

The overall conclusion of the thesis will address the tension between the desire to have a common set of evidential rules and the tribunal's need for individuality. It will go into the details of the advantages and disadvantages of adopting a common approach to evidence. Further, it will address the question whether this is feasible in the context of the existing international tribunals<sup>213</sup>.

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<sup>213</sup> See: Chapter 7, Section 4, in particular 4.2.4, 273

## Chapter Five: *Amicus curiae*

### Section 1: Introduction:

#### 1.1 Introduction:

This chapter concerns *amicus curiae* submissions. This topic is particularly relevant in recent times because of the increasing role of non-state actors in international litigation. The increase in the interaction between States, disputes before international tribunals, and international agreements means that non-States can more than ever be affected by the actions of States. One of the ways in which non-State actors can participate in international litigation is through *amicus curiae* submissions.

The general thesis still runs through this chapter. This chapter will examine whether there is a common approach on *amicus curiae* and then figure out the reasons behind the approach of the tribunals. Finally, the chapter will start to address whether there should be a common approach on *amicus curiae* but the details will be left to the final chapter where all three tribunals and aspects of evidential rules will be looked at together.

#### 1.2 What is an *amicus curiae*? What are its functions?

Literally translated from Latin, “*amicus curiae*” means “friend of the Court”. Other definitions have also been offered: (a) “One who calls the attention of the court to some point of law or fact which would appear to have been overlooked”<sup>214</sup>, (b) “a person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter”<sup>215</sup>.

Over time, there have been developments changing the traditional impartial role of the *amicus curiae* in different legal traditions<sup>216</sup>. However, the friend of the court is essentially still a bystander who is not a party to the proceedings but intervenes in order to make submissions to the court<sup>217</sup>.

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<sup>214</sup> Osborne’s Law Dictionary (9<sup>th</sup> Edition, 2001)

<sup>215</sup> Black’s Law Dictionary (7<sup>th</sup> Edition, 1999)

<sup>216</sup> See further: Bellhouse, (2004) 187-188

<sup>217</sup> See generally: Angell, (1967) 1017-1021; Krislov, (1963) 694-697

The *amicus curiae* brief derives from the Common Law tradition and was a solution to address the disadvantages of the adversarial system. The notion dates back as far as Roman law and the 14<sup>th</sup> Century<sup>218</sup>. In its early days, an *amicus curiae* would be a bystander who had no interest in the dispute and provided information omitted by the parties or otherwise unavailable<sup>219</sup>. However, in recent years, scholars have argued that the nature of the *amicus curiae* has changed. It has been turned into a tool by public interest organizations to promote a particular position<sup>220</sup>.

In addition to the supplying information to the court, *amicus curiae* submissions also have a variety of other functions<sup>221</sup>. First, they can provide specialist or legal expertise to the court especially if the dispute falls outside their competence<sup>222</sup>. Second, they can provide factual information to the court. The information could come from specialized organizations with insights on certain issues. Third, *amicus curiae* briefs can also provide a measure of due process in terms of access to those who cannot directly participate but will be affected by the decision of the court<sup>223</sup>. Fourth, *amicus curiae* briefs can represent the public interest at large, a point argued by many NGOs<sup>224</sup>. Last, on questions with wider social and moral implications, they can provide further legitimacy to the court's decision<sup>225</sup>.

*Amicus curiae* submissions can also fill in gaps where States have omitted certain issues from the pleadings to the Court. This may be for several reasons: a) the omitted issue is only peripheral to the main question, b) the omission is part of the litigation tactics, and most importantly, c) because the omitted facts will not be in the State's interest. The information lacking from the Court would usually be supplied by the other party. However, there can be instances where an interest of a third party would be omitted by both parties and hence the need for *amicus curiae* briefs.

*Amicus curiae* have a limited role in the proceedings itself. “[They] cannot control the direction or management of the proceedings. They are not served with papers or other relevant documents. They cannot examine or cross-examine witnesses and cannot be heard without special leave of the court. They are not entitled to any

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<sup>218</sup> Lowman, (1992) 1243-44 and 1248-50

<sup>219</sup> As contrasted to the intervener who must normally have a direct interest in the outcome of the case. If allowed, the intervener becomes a party to the proceedings.

<sup>220</sup> Krislov, (1963) 697-704

<sup>221</sup> Discussed in Bartholomeusz, (2005) 278-279

<sup>222</sup> E.g. *USA - Certain Shrimp and Shrimp Products Case*, WTO DSB, 1998: Briefs from NGOs with environmental law expertise were accepted by the WTO Appellate Body.

<sup>223</sup> E.g. *Australia-Salmon. Article 21.5 Case*, WTO DSB, 2000 para 7.8: There was an amicus brief filed from “Concerned Fisherman and Processors” from South Australia.

<sup>224</sup> See further: Bartholomeusz, (2005) 279

<sup>225</sup> Bryden, (1987) 508-510; See further on other roles of *amicus curiae*: Williams, (2000) 633-368

cost or compensation”<sup>226</sup> The acceptance of *amicus curiae* briefs generally increases the workload of courts. As will be seen in this chapter, there is a tension between, on one hand, the desire to admit information for all the advantages mentioned above, and on the other, to deal with dispute in the most efficient way possible.

In this chapter, only *amicus curiae* briefs submitted to tribunals independently of the Memorial of the parties will be examined. In all three of the selected tribunals, non-State entities can submit information to tribunals as an annex to the submission of the parties. This will mean, in the eye of the tribunal, that the submission will be supporting one side of the argument, and losing its neutrality. However, this might be a sacrifice that the non-State entity has to make in order for their voice to be heard.

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<sup>226</sup> Razzaque, (2002) 171

## Section 2: Municipal Law:

### 2.1 Introduction:

The ability for a domestic court to receive *amicus curiae* briefs differ from one jurisdiction to another. Historically, the *amicus curiae* brief has its roots in the Common Law. Imported from England where its use is not as extensive, the practice is used widely in North America.

In many jurisdictions, there has been an increase in recent years<sup>227</sup> in the general awareness of the public on legal issues and the involvement of disputes with scientific matters have encouraged more use of *amicus curiae*. As a result, there are now many States in the Civil Law tradition which have incorporate rules on *amicus curiae*. Therefore, the distinction in the use of *amicus curiae* between the Common and Civil Law traditions will not be as apparent when compared to the issues in the other two chapters. Consequently, the practice of the municipal jurisdictions on *amicus curiae* will not be divided into their respective traditions as in other chapters.

### 2.2 The practice of municipal courts:

This section will give an overview of the approach of different municipal jurisdictions, and will address three in more detail: the United States, England and France. As a general overview of the worldwide practice, the following can be said about each region<sup>228</sup>:

a) There is an established practice of *amicus curiae* in North America. In both Canada and the United States, provisions on *amicus curiae* exist in the relevant Rules of the Court and are applied accordingly<sup>229</sup>.

b) In Latin America, *amicus curiae* are generally permitted apart from in a few States: El Salvador, Nicaragua and Panama. Some States have adopted codified

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<sup>227</sup> Due to improved technology, media and communication.

<sup>228</sup> As summarized in the comparative study carried out in: Ewing et al., (2006) . Even though this article was written in the context of intellectual property, it does give a good comparative overview of the different jurisdictions on the question of *amicus curiae*.

<sup>229</sup> E.g. Rules 55 to 57 of the Supreme Court of Canada.

provisions<sup>230</sup>, while others lack explicit provisions but allow the participation of non-State entities through its practice<sup>231</sup>.

c) In Europe, the use of *amicus curiae* briefs is very limited apart from in a few States. As a general rule, the evidence of non-parties would have to be annexed to the submission of the parties. However, there has been some use of *amicus curiae* briefs in the United Kingdom.

### 2.2.1 The United States:

*Amicus curiae* briefs are used extensively in the United States. The Supreme Court has allowed a range of *amicus curiae* submissions covering a wide variety of interests. *Amicus curiae* briefs have a basis in Rule 37 of the Rules of the Court. Rule 37(1) of the Court states that: “An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.” The *amicus curiae* brief would normally be submitted as a written document.

The brief can be admitted if the Court grants leave or if it is agreed upon by the parties<sup>232</sup>. From recent practice before the Supreme Court, the parties would allow for the filing of an *amicus curiae* brief where the case concerns issues of a public nature<sup>233</sup>. Further, the practice of the Court has been to “grant nearly all motions for leave to file as *amicus curiae* when consent is denied by a party”<sup>234</sup>.

Various branches of the government can also submit *amicus curiae* briefs regardless of whether consent has been granted by the parties or the Court has granted leave. These include the Solicitor General, the Attorney-General of the State and the authorized law officer of a city, county, town, or similar entity<sup>235</sup>.

On occasion, the Supreme Court has gone as far as directly appointing an *amicus curiae*. This might include situations where the Court suspects collusion or

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<sup>230</sup> E.g. Argentina, Brazil, Costa Rica

<sup>231</sup> See further: Ewing et al., (2006)

<sup>232</sup> Rule 37(3) of the Rules of the Supreme Court.

<sup>233</sup> Williams, (2000) 375

<sup>234</sup> Kearney and Merrill, (2000) 762

<sup>235</sup> Rules of the Supreme Court of the United States, Rule 37(4)

where there is no contradictor to a particular argument<sup>236</sup>. A large number of *amicus curiae* briefs are filed in the Supreme Court every year<sup>237</sup>.

The question then arises of the extent which the Court takes into account the *amicus curiae* briefs. It is not obliged to do so but there has been agreement among many American legal scholars that these briefs can have a profound effect on the decision of the Court<sup>238</sup>. In its jurisprudence, there have been cases where the Court: a) has cited as many as 29 briefs in its judgment, b) has accepted an argument which had only been suggested by an *amicus curiae*<sup>239</sup>.

### 2.2.2 England:

The use of *amicus curiae* in the English courts has been limited compared to the practice in the United States. The English courts play a big role in determining whether an *amicus curiae* brief is admitted. Such briefs have been used in various levels of courts<sup>240</sup> and also in many areas of the law<sup>241</sup>. As summarized by Bellhouse: “It has been a practice, rather than an enshrined right, whereby arguments on points of law, or information, can be presented before the tribunal, with its permission and often by its active invitation, which would otherwise not be heard because they did not form part of the respective cases of the litigants represented.”<sup>242</sup> Like the United States system, the *amicus curiae* briefs in the English system are used to fill in the lacunae left by the adversarial system and allow for issues of public interest to be presented to the court. “This power [to admit information from *amicus curiae*] was invariably used to appoint an official figure, usually the Attorney-General, Official Solicitor or Counsel from a list maintained by the Treasury Solicitor and has regularly been used in the Family Division.”<sup>243</sup>

In 2001, there was reform in the English system on this issue. The Attorney-General, in consultation with the Lord Chief Justice, produced a memorandum to Judges which stated more precisely the rules governing *amicus curiae*, or under its

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<sup>236</sup> Ennis, (1984) 605

<sup>237</sup> For example, Kearney and Merrill stated that in *Regents of the University of California v Bakke* which concerned the issue of a reverse discrimination in favour of minority groups, 54 *amicus* briefs were filed. Kearney and Merrill, (2000) 831

<sup>238</sup> See further the study carried out in: Kearney and Merrill, (2000) especially p. 757-761. Also: Angell, (1967) 1035-1042; Bryden, (1987) 507-508

<sup>239</sup> See further: Williams, (2000) 376

<sup>240</sup> Including the Court of Appeal and House of Lords

<sup>241</sup> Property Law, Law of Contract, Family Law, and Human Rights Law. See further: Bellhouse, (2004) 188-191

<sup>242</sup> Bellhouse, (2004) 190

<sup>243</sup> Harlow, (2002) 7

new name, “the Advocate to the Court”<sup>244</sup>. *Inter alia*, the memorandum stated that “a court may properly seek the assistance of an Advocate to the Court when there is a danger of an important and difficult point of law being decided without the court hearing relevant argument.”

An example of how *amicus curiae* briefs have been used in the English courts included a case involving the question of whether a piece of land belonged to a foreign based company. The Court of Appeal invited the Attorney-General to attend the proceedings as *amicus curiae* because, if the foreign based company was not the owner, then the land would be vested in the Crown<sup>245</sup>. Another example of the use of an *amicus curiae* brief was in the *Pinochet Case*. “Because of the urgency and the important and difficult questions of international law which appeared to be raised, the Attorney General, at your [their] Lordships request, instructed Mr. David Lloyd Jones as *amicus curiae*...”<sup>246</sup>

### 2.2.3 France:

The French jurisdiction is to be contrasted with the first two mentioned. In France, there are no explicit provisions for the use of *amicus curiae* briefs. However, studies have shown that, in some exceptional cases, the French court has also allowed them. Duncun has highlighted a case about surrogate motherhood in the Court of Cassation. The acceptance of *amicus curiae* briefs was an innovation and came from the Premier President of the Court of Cassation<sup>247</sup>. The Premier President stated that “The Court of Cassation, in order to enrich the debates which unroll before it and to raise them to the elevated level which should be theirs because of their technicality or specificity, should open the debates to the contribution of outsiders so long as the experts solicited by the court are beyond dispute, representative and of high moral and human value.”<sup>248</sup> Duncun enunciates the debate of French academics on this issue: some say that the Court has an inherent right to “innovate their procedure to function more effectively”, while others think that the Court should not improvise procedure not authorized by Parliament<sup>249</sup>. In this particular case, the expert who was selected

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<sup>244</sup> See further: Bellhouse, (2004) 191-192

<sup>245</sup> *Morelle Ltd v Wakeling*, Queen's Bench, 1955

<sup>246</sup> *Pinochet Case*, House of Lords, 1998, 1456

<sup>247</sup> Laurin, (1989), 341-342. See further: Duncun, (1994) 450-451

<sup>248</sup> Laurin, (1989), 342; translated in Duncun, (1994) 450

<sup>249</sup> Duncun, (1994) 450



was an oncologist and the president of the National Consultative Ethics Committee for Lifesciences and Healthsciences. Duncun further noted that, in the context of French courts, even though the practice of *amicus curiae* briefs “may have been inspired by British and American practice...[the] practice at the European Court of Human Rights...may have provided the true inspiration.”<sup>250</sup>

### 2.3 Preliminary Conclusion:

The practice of municipal jurisdictions on *amicus curiae* has varied. Even though the notion of the *amicus curiae* has its roots in the Common Law tradition, the practice has spread to other jurisdictions around the world. It has been used very widely in the United States, and to a lesser extent in England. Unlike some areas of evidential rules, the Common/Civil Law divide is not so apparent on this issue. For example, many Latin States which belong to the Civil Law tradition have introduced the use of the *amicus curiae*.

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<sup>250</sup> Duncun, (1994) 453

## International tribunals: ICJ, ITLOS and WTO DSB:

### Section 3: ICJ:

#### 3.1 Introduction:

The section will examine the rules and practice of the ICJ concerning *amicus curiae* briefs. As emphasized in the previous section, this issue is particularly pertinent at this time because of the increasing interests of non-State actors involved in cases before the Court, especially those which can have an effect on trans-border issues, such as the environment and human rights<sup>251</sup>.

In contrast to the other two chapters, this section will examine both the contentious cases and the advisory opinions because there has been some development regarding latter that are worth noting. These two types of cases are different and their distinction must be kept clearly in mind.

#### 3.2 The PCIJ:

This section will examine the practice of the PCIJ in order to set the background for the examination of the ICJ's rules on *amicus curiae*<sup>252</sup>.

In the context of the PCIJ, the dispute settlement process was seen as exclusive to States and the extent to which non-State entities could participate was very limited. The view of jurists at the time was one which did not consider individuals as subjects of international law. States were the only entities which were subjects of the Law of Nations. There was an assumption that if the interests of individuals were at dispute, then the State would make the claim on their behalf<sup>253</sup>.

##### 3.2.1 Provisions and practice:

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<sup>251</sup> According to one statistic, as an indication of what a wide impact the decisions of the Court have, as many as 1,200 applications in the period 1994-1995, and 1,200 applications in 1995-1996 were presented to the Court to submit information, Razzaque, (2002) 172.

<sup>252</sup> See the relationship between the ICJ and the PCIJ, see: Chapter 2, Section 2.1, 14-18

<sup>253</sup> Discussed in Shelton, (2006) ; The traditional view was represented in the second edition of Oppenheim, (1912) 362-369; In addition to the claims brought by States on their behalf, individuals can otherwise bring their own claim if the practice of States or particular treaties provides for it. Judge Lauterpacht explained: "When the Committee of Jurists, which in 1920 drafted the Statute of the [PCIJ], adopted the present Article 3, one of the principal reasons which prompted its decision was the view that individuals are not subjects of international law and therefore they can have no locus standi before international tribunals." Lauterpacht, (2002) 109. On this issue, see also: Brownlie, (1962) and Chinkin, (1993) 230

The only instrument of the PCIJ which addressed *amicus curiae* briefs was the Statute. There were two articles worth noting: article 26 and article 66. The ICJ would later base its provisions on these two articles.

Article 26 of the PCIJ Statute concerns the possibility of a non-State entity to submit information to the Court in contentious cases. It states, *inter alia*, “In Labour cases, the International Office shall be at liberty to furnish the Court with all relevant information, and for this purpose the Director of that Office shall receive copies of all the written proceedings.” As apparent from the text, this article only concerned labour cases and the submission of information from the ILO’s international office. This provision was the predecessor of Article 34 of the ICJ Statute.

However, there has been debate among scholars as to whether this article can be seen as the precedent for the interpretation of the term “public international organizations” in article 34 of the ICJ Statute<sup>254</sup>. This is an issue which will be addressed later in the context of the ICJ<sup>255</sup>. To the knowledge of the writer, Article 26 of the Statute has never been used by the Permanent Court as a means of admitting information from the International Office of the ILO.

In contrast with Article 26, Article 66 of the Statute concerns the admission of information from non-State entities in advisory opinion proceedings. Where an advisory opinion has been requested, according to article 66 of the Statute, the Registrar must notify, *inter alia*, “international organization[s] considered by the Court...as likely to be able to furnish information on the question, that the Court will be prepared to receive..., written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.”<sup>256</sup> A distinction can be drawn between article 26 and 66. The former only allowed submissions from the International Office of the ILO, but the latter adopted a much wider approach in allowing submission from “international organizations”.

The Permanent Court has allowed submissions from a wide range of entities including private international organizations on the basis of article 66<sup>257</sup>. The Court

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<sup>254</sup> This is because of the tripartite structure of the ILO. See further: Shelton, (2006) 9

<sup>255</sup> See: Chapter 5, Section 3.3.2, 133-136

<sup>256</sup> The term “international organizations” in this context was never defined.

<sup>257</sup> See further: Bartholomeusz, (2005) 217-225, and Clark, (1981) 116 *et seq.*; Shelton, (1994) 621-623 and Chinkin, (1993) 229-230

has also stated that it was prepared to receive information from individuals<sup>258</sup>. The number of *amicus curiae* submissions in advisory opinions has been significant. There were a number of cases which involved the ILO and organizations of workers or employers<sup>259</sup>. In the PCIJ's Annual Report in 1927, a list of international organizations which had participated in advisory proceedings was compiled. Although a list early in the history of the Court, it was an illustration of the high level of participation. The list comprised a wide range of international organizations, many of which were union and trade representatives<sup>260</sup>.

To illustrate the willingness of the Permanent Court to allow participation of non-States in advisory opinions, in two cases, it went as far as admitting information from national organizations: a) a memorandum from the Netherlands General Confederation of Trade Unions<sup>261</sup>, b) a letter from the Central Association of French Agriculturalists<sup>262</sup>. This is to be contrasted to the much more limited access which the ICJ has granted to non-governmental international organizations<sup>263</sup>.

In addition to these two articles, another article which could have been potentially used by the Court to admit *amicus curiae* briefs was Article 50 of the Statute. The Article permits the Court to "entrust any individual, body, bureau, commission or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion." As background to the article, the PCIJ Drafting Committee of the Advisory Committee of Jurists had a proposal that the Permanent Court should be able to seek views apart from those submitted by the parties, which consequently resulted in Article 50 of the Statute<sup>264</sup>. Shelton has argued that the article was written for the purpose of seeking evidence not otherwise provided by the parties<sup>265</sup>. The PCIJ could use this article to gather information from entities other than States which would *de facto* resemble an *amicus curiae* brief.

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<sup>258</sup> It was willing to receive explanatory notes in supplement to statements made by petitioners, provided that it was filed with the Registry before the deadline. *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, PCIJ, 1935, 43

<sup>259</sup> The first case was *Designation of the Workers' Delegate for the Netherlands*, PCIJ, 1922 where many trade unions filed statements in the proceedings. Other cases include: *Competence of the ILO to Regulate, Incidentally, the Personal Work of the Employer*, PCIJ, 1926, 8, *Interpretation of the convention of 1919 concerning employment of women during the night*, PCIJ, 1932, 367

<sup>260</sup> E.g. International Agricultural Commission, International Labour Organization, International Federation of Landworkers, International Federation of Christian Trade Union of Landworkers, International Confederation of Christian Trade Unions.

<sup>261</sup> *Designation of the Workers' Delegate for the Netherlands*, PCIJ, 1922, 11

<sup>262</sup> *Competence of the International Labour Organization (persons employed in agriculture)*, PCIJ, 1922, 13; *Competence of the International Labour Organization (methods of agricultural production)*, PCIJ, 1922, 13

<sup>263</sup> See: Chapter 5, Section 3.3.2.2, 142-148

<sup>264</sup> Advisory Committee of Jurists, (1920), 561.

<sup>265</sup> Discussed in: Shelton, (1994) 627 .

### 3.2.2 Preliminary Conclusion:

The jurisprudence of the Permanent Court must be divided into two parts: the contentious proceedings and the advisory opinion. As far as contentious proceedings are concerned, the provisions are very limited only giving the ILO's International Office the opportunity to submit information, and this provision has never been used. In contrast, in advisory opinions, the provisions of the Court allow "international organizations" to submit information. In practice, a wide range of international organizations have done so, many of which were trade and labour unions.

## 3.3 The ICJ

### 3.3.1 Introduction:

With the background of the PCIJ's approach, this section will continue to examine the provisions and the practice of the ICJ. In the same way as the PCIJ, only States can be parties to disputes before the Court<sup>266</sup>. This again raises the question of how non-State entities can be represented, if the State does not bring the dispute to the Court on their behalf.

The scope of this section does not cover *amicus curiae* briefs attached to party's submissions. However, it is of note that this channel is often used, as illustrated in the *Gabcikovo-Nagymaros Case* where the Natural Heritage Institute prepared a brief that was eventually annexed to the Hungary Memorial. In the *Armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda) Case*, briefs prepared by Amnesty International and other NGOs were annexed to the Uganda Memorial<sup>267</sup>.

### 3.3.2 The provisions of the ICJ:

The provisions of the ICJ resemble those of the PCIJ in many respects. A mere look at the text will show that the former was based on the latter which means

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<sup>266</sup> *ICJ Statute*, 1945 art 34(1)

<sup>267</sup> It has been argued that although annexing *amicus curiae* briefs to memorial of States might in reality have the effect of placing the NGO as being on one side of the dispute, at least the material will be part of the case file and will be kept on record. Shelton, (2006) 18-19

that there is a clear line drawn between the rules regarding contentious cases and advisory opinions.

### 3.3.2.1 Contentious Cases:

The first provision of note is Article 34 of the ICJ Statute, which was based on article 26 of the PCIJ Statute. At the U.N. Conference on International Organization, the United States proposed in the draft Article 34 the ability of the Court to request information from public international organizations and to receive information presented by the organizations voluntarily<sup>268</sup>. This proposal was accepted and the increasing importance of international organizations was recognized. The Drafting Committee of the Washington Committee of Jurists stated that “The Committee has not wished to go so far as to admit...that public international organizations may become parties to a case before the Court. Admitting only that such organizations might, to the extent indicated, furnish information, it has laid down a rule which certain persons have considered as being one of procedure rather than of competence. The Committee, by placing it nevertheless in Article 34, has intended to emphasize its importance.”<sup>269</sup> The chairman of the legal committee, Gerald Fitzmaurice, said that the United States proposal concerning the ability of submission of information by international organizations without a previous request from the Court “was probably meant to embrace that provision relating to the ILO” in article 26 of the PCIJ Statute<sup>270</sup>.

Article 34(2) and 34(3) of the Statute allow for the submission of information from public international organizations in contentious cases. Article 34(2) provides that “The Court...may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.” However, the interpretation of this article has been subject to debate.

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<sup>268</sup> See further on the drafting of the article: Rosenne, (2006) 620-626

<sup>269</sup> Rosenne, (2006) 621

<sup>270</sup> Doc. Jurist 30, G/22, 14 U.N.C.I.O. Docs 131, 133; Fitzmaurice noted that if the jurisdiction of the Court was to be extended to international organizations, this would have to be addressed separately, *ibid* 136-137. He also expressed his opinion stating that “the term included only those organizations having States as members, *ibid* 137; See further: Shelton, (2006) 7-8.

First, some argue for the more restrictive interpretation of the word “information” in that it excludes policy submissions and legal arguments. However, there has not been enough practice to support view<sup>271</sup>.

Second, there are questions as to the scope of the term “public international organizations”<sup>272</sup>. There have been suggestions that article 34(2) should also include NGOs<sup>273</sup>. Despite the debate, the Rules of the Court have been quite explicit as the definition of the term. Under Article 69(4) of the Rules of the Court, the term “denotes an international organization of States”.

Article 34(2) also stipulates some requirements that submissions must meet. The Memorial must be submitted before the closing of the written pleadings and is to include any information relevant to the case. The Court may ask the organization for further information, both written and oral. The parties are then given the opportunity to comment on submissions of the organization.

Article 34(3) provides that “whenever the construction of the constituent instrument of a public international organization or of an international convention adopted there-under is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings.” Even though this provision does not explicitly provide for the submission of evidence, informing international organizations of whether their constituent instrument is before the Court will further encourage submissions under Article 34(2).

In addition to these two articles, and similar to the PCIJ, another article which can potentially be used as a channel for the submission of *amicus curiae* briefs is Article 50 of the ICJ Statute. This article will also be discussed in the context of experts<sup>274</sup>. The Article stipulates: “The Court may, at any time, entrust any individual, body, bureau, commission or other organization that it may select, with the task of carrying out an enquiry or giving expert opinion.” This article permits the Court to seek information should it be necessary. However, it does not provide the ability for non-parties to submit evidence on their own initiation. Nonetheless,

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<sup>271</sup> See: Chinkin and Mackenzie, (2002) 139-140 and Bartholomeusz, (2005) 213

<sup>272</sup> Shelton has looked at the provisions of the PCIJ. She questioned whether “public international organizations” should be interpreted by looking at the PCIJ’s provisions. Shelton, (1994). What constitutes a “public” or “private” organization is also much debated. See further: Bowett, (1975) 5, Shelton, (2006) 9-10

<sup>273</sup> Shelton argues that the term “public international organizations” should include “international public interest organizations”. Shelton, (1994) 625. The wider interpretation is unlikely to gain favour among States or with the Court, see: Bartholomeusz, (2005) 215-216.

<sup>274</sup> See Chapter 6, Section 3, 186-187

organizations which cannot submit documents in any other way could use this channel, should the Court allow it.

### 3.3.2.2 Advisory Opinion:

Article 66 of the Statute concerns *amicus curiae* submissions, from both States and non-State entities, in advisory opinions. Article 66(2) states: “The Registrar shall...notify any State entitled to appear before the Court or International Organization considered by the Court...as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time-limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.” Article 66(3) states that if the Court fails to notify any State according to paragraph 2, then the State can communicate to the Court its desire to make a submission. However, the Court still has the discretion to admit such evidence. Article 66(4) permits States and organizations to make comments on statements by other States or organizations.

There are two more points worth noting in this section: a) Article 66 of the ICJ Statute was based on Article 66 of the PCIJ Statute as apparent from the wording of the two articles<sup>275</sup>, b) in the exercise of its advisory opinion, the Court will also be guided by the provisions on contentious cases if it considers them to be applicable<sup>276</sup>.

### 3.3.3 The practice of the ICJ:

#### 3.3.3.1 Contentious Cases:

In contentious cases, information has been submitted by a number of non-party sources. The following section will examine the Court’s jurisprudence but dividing it according to the sources of the information: a) non-party States, b) International Organizations, c) non-governmental organizations.

#### Information from non-party States:

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<sup>275</sup> See: Chapter 5, Section 3.3.2, 133-136

<sup>276</sup> ICJ Statute, 1945 art 68



The submission of information by non-party States has not been provided for by the Court's provisions. However, to the knowledge of the writer, the Court has allowed this on one occasion, in the *Corfu Channel Case*. The dispute between the United Kingdom and Albania concerned the question of whether latter was responsible for the mine-laying in the Corfu Channel which had damaged vessels of the British Navy.

Although not called as such by the Court or the parties, the *amicus curiae* brief came from Yugoslavia which was permitted to submit a communiqué to the Court. Previously, there were suggestions made by the United Kingdom that the mines in the Channel were laid by Yugoslav ships, based on evidence given by a Yugoslav Commander who had testified to that effect. The United Kingdom made it clear that their case was against Albania and that they were making no allegations against Yugoslavia. Yugoslavia's communiqué denied this evidence.

The acceptance of the communiqué has meant the admission of information from a non-party State. The communiqué was not subject to any oral examination or cross-examination. In the words of the Court: "The Yugoslav Government, although not a party to the proceedings, authorized the Albanian Government to produce certain Yugoslav documents, for the purpose of refuting the United Kingdom contention... As the Court was anxious for full light to be thrown on the facts alleged, it did not refuse to receive these documents. But Yugoslavia's absence from the proceedings meant that these documents could only be admitted as evidence subject to reserves, and the Court finds it unnecessary to express an opinion upon their probative value."<sup>277</sup> It has been suggested that, in admitting this evidence, the Court was relying on Article 50 of the Statute<sup>278</sup>.

Information from international organizations:

Despite being expressly provided for in the provisions, the practice of admitting information from international organizations has been limited. The Court has most often used this article in relation to the International Civil Aviation Organization (ICAO). An example of such use of an *amicus curiae* brief was in the *Aerial Incident of 3 July 1988 Case* between Iran and the United States. The former

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<sup>277</sup> *Corfu Channel Case*, ICJ, 1949, 17

<sup>278</sup> Chinkin, (1993) 227

had requested the Court to “determine on appeal from the decision rendered...by the Council of the International Civil Aviation Organization whether the United States had violated the [Convention]...through...actions with respect to the shooting down of an Iranian commercial airliner, and, if so, the amount of compensation due.”<sup>279</sup>

The Court invited the ICAO to provide information on the proceedings of its Council after the aerial incident<sup>280</sup> as well as copies of decisions adopted by the Council<sup>281</sup>. The Council submitted to the Court its observations which included factual descriptions of earlier proceedings in the Council and some conclusions regarding the procedure followed<sup>282</sup>.

Further, in the *Appeal Relating to the Jurisdiction of the ICAO Council Case* between India and Pakistan, there were questions concerning the construction of the Convention on International Civil Aviation and the International Air Services Agreement. Consequently, the Registrar communicated copies of the written proceedings to the Secretary General of the ICAO in accordance with Article 34(3) of the Statute<sup>283</sup>. The time-limit for the Organization to submit observations in writing was also later laid down. However, within the time-limit, the Secretary General stated that ICAO did not intend to submit observations.”<sup>284</sup>

Regarding submissions from the ICAO to the Court, there was further development at the time of and in relation to the *Aerial Incident Case of 27 July 1955*. During the 33<sup>rd</sup> session of the Council of the ICAO, it was agreed within the Council that the Secretariat could provide information to the Court upon its request without referring further to the Council. However, if it is a matter of requesting opinion or comments from the Organization then this would have to be submitted to the Council<sup>285</sup>. To an extent, this has made the submission of information to the Court easier.

In the *Lockerbie Cases*, the Court also notified the Secretary General of the ICAO for the Organization’s written comments on the case and sent copies of the pleadings. The Court further stated that the observations should be limited to questions of jurisdiction and admissibility. The Secretary-General of the ICAO “informed the Court that the Organization “ha[d] no observations to make for the

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<sup>279</sup> *Aerial Incident of 3 July 1988*, ICJ, 1989, Application instituting proceedings filed on 17 May 1989, 2

<sup>280</sup> The shooting down of Iran Air flight IR655

<sup>281</sup> Discussed in Chinkin and Mackenzie, (2002) 141, *Aerial Incident of 3 July 1988*, ICJ, 1989, ICJ Pleadings, Vol. II, 618

<sup>282</sup> See further: Rosenne, (2006) 629

<sup>283</sup> *Appeal Relating to the Jurisdiction of the Icao Council*, ICJ, 1972 para 5

<sup>284</sup> *Appeal Relating to the Jurisdiction of the Icao Council*, ICJ, 1972 para 5

<sup>285</sup> Rosenne, (2006) 625-626

moment" but wished to remain informed about the progress of the case, in order to be able to determine whether it would be appropriate to submit observations later."<sup>286</sup> However, there were no consequent comments submitted by the Organization.

As for cases not concerning the ICAO, in the *Border and Transborder Armed Action Case* between Nicaragua and Honduras, the Registrar "drew the attention of the Secretary-General of the Organization of American States to Article 34(3) of the Statute..." In the case, there were questions concerning the construction of the Pact of Bogota. The Registrar informed the Secretary-General that the Court had instructed him to communicate to the Organization copies of all the written proceedings<sup>287</sup>. In response, the Secretary-General replied that, in his opinion, he did not have the authority to submit observations on behalf of the Organization. He added that each Member State would need to be supplied with a copy of the pleadings<sup>288</sup>. Consequently, no brief was submitted to the Court.

Chinkin and Mackenzie have noted that the submission of information from international organizations to the Court has been rare<sup>289</sup>. They argue that there have been many cases where participation from international organizations could have been expected. The cases involved questions within the scope of particular international organizations. For example, could there have been more participation by: a) the ICAO in the various incident cases<sup>290</sup>, b) environmental agencies on cases concerning trans-border environmental issues<sup>291</sup>, c) the UN security Council or NATO in the *Legality of the Use of Force Cases* between Yugoslavia and the NATO members<sup>292</sup>, d) the UN General Assembly Decolonisation Committee in the *East Timor Case*<sup>293</sup>, e) the UN Human Rights bodies in *LaGrand* and *Breard*<sup>294</sup>, and e) the North Atlantic Fisheries Organization or the European Union Community in the *Case concerning Fisheries Jurisdiction (Spain v. Canada)*<sup>295</sup>? Chinkin and Mackenzie further suggests that the factors limiting the submissions of international organizations seem to be: (a)

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<sup>286</sup> *Lockerbie Case*, ICJ, 1998, 12

<sup>287</sup> Pursuant to Article 69(3) of the Rules. *Case Concerning Border and Transborder Armed Actions*, ICJ, 1988 para 6

<sup>288</sup> He recorded his understanding that the Court had notified all parties to the Pact of Bogota that the proceedings appeared to raise questions of the construction of the instrument, see: *Case Concerning Border and Transborder Armed Actions*, ICJ, 1988 para 7

<sup>289</sup> Chinkin and Mackenzie, (2002) 141-142

<sup>290</sup> E.g. *Aerial Incident of 10 August 1999*, ICJ, 2000 and *Lockerbie Case*, ICJ, 1998

<sup>291</sup> E.g. *Gabcikovo-Nagymaros Project Case*, ICJ, 1997. See further: Shelton, (1994) 625

<sup>292</sup> e.g. *Legality of Use of Force*, ICJ, 2004

<sup>293</sup> *East Timor Case*, ICJ, 1995

<sup>294</sup> *LaGrand Case*, ICJ, 2001 and *The Breard Case*, ICJ, 1998

<sup>295</sup> *Fisheries Jurisdiction*, ICJ, 1998

the internal issues within each international organization<sup>296</sup>, and (b) the time restrictions of the Court<sup>297</sup>. “The conclusion has to be that, even where it is possible, international organizations have generally not chosen to make submissions, nor has the Court generally considered it useful to seek them”<sup>298</sup>

#### Information from NGOs:

Similar to the case of non-party States, submissions by NGOs are not explicitly provided for in the provisions of the Court. The jurisprudence of the Court has shown that they have had a limited role.

In the *Asylum Case*, the International League for the Rights of Man requested to present relevant information to the Court, pursuant to article 34 of the Statute<sup>299</sup>. This request was submitted simultaneously to that in the *South-West Africa Case* (advisory opinion). The Court stated that it was prepared to accept information from the League in the *South-West Africa Case*<sup>300</sup> but not in the *Asylum Case*. The Court based the distinction on the difference between the wordings of the provisions on contentious cases (“public international organization”<sup>301</sup>) on one hand, and advisory opinions (“international organization”<sup>302</sup>) on the other. The League for the Rights of Man was deemed as an organization which “cannot be characterized as public international organization as envisaged by Statute.”<sup>303</sup>

#### Information from individuals:

The jurisprudence of the Court has shown that on no occasion has it allowed submissions from individuals. Rosenne has suggested that the Court ought to use its powers from the provisions to allow individuals concerned in a case to present his

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<sup>296</sup> There could be disagreements among members of an International Organization on: (a) institutional competence, (b) what constitutes relevant information, and (c) what can be considered information, opinion, or comment.” Chinkin and Mackenzie, (2002) 142-143

<sup>297</sup> Rosenne, (1997) 648-649 Vol II, See further on debate and developments of the article: Rosenne, (2006) 627-633

<sup>298</sup> Chinkin and Mackenzie, (2002) 143

<sup>299</sup> Robert Delson, Letter to the Registrar, *Asylum Case*, ICJ, 1950, 1950 ICJ Pleadings, Vol. II, 227, 7 March 1950

<sup>300</sup> See: Chapter 5, Section 3.3.3.2

<sup>301</sup> *ICJ Statute*, 1945 art 34

<sup>302</sup> *ICJ Statute*, 1945 art 66

<sup>303</sup> *Asylum Case*, ICJ, 1950 ICJ Pleadings 1950, Vol. II, 227-228. The League did not request to present information in accordance with article 50.

version of the facts to the Court. This would increase the Court's general standing and prestige<sup>304</sup>.

Information from other sources:

The final way the Court could potentially admit information is through Article 50 of the Statute. However, this article has never been used as a means to obtain information in a way which would resemble an *amicus curiae* brief.

Other observations:

In the context of the examination of the ICJ's approach on *amicus curiae*, the *Nicaragua Case* is of note. This case has shown that the Court can take a very open approach to the admission of information. The Court stated that information in the public domain could potentially be used in its judgment. Information could play a role in the case "in ways and by means not contemplated by the Rules"<sup>305</sup>. The Court stated further that it is "not bound to confine its consideration to the material formally submitted to it by the parties" and it is also "not solely dependent on the arguments of the parties before it with respect to law"<sup>306</sup>.

The Court also said that it was aware of the existence of information not formally submitted by either party. Further, a document was presented to the Court without going through the formal channels. "Revolution Beyond Our Borders", a publication of the United States Department of State was sent by the United States Information Office in The Hague to an official of the Court's Registry so that it could be made available to anyone at the Court interested in the subject<sup>307</sup>. The Government of Nicaragua argued that the document could not "probably be considered by the Court"<sup>308</sup>. However, the Court noted the special circumstances of the case and ruled that "it may, within limits, make use of information in such a publication"<sup>309</sup>.

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<sup>304</sup> Rosenne, (1967) 250

<sup>305</sup> *The Nicaragua Case*, ICJ, 1986, 25 para 31

<sup>306</sup> *The Nicaragua Case*, ICJ, 1986, 25

<sup>307</sup> *The Nicaragua Case*, ICJ, 1986, 44 para 73

<sup>308</sup> *The Nicaragua Case*, ICJ, 1986, 44 para 73

<sup>309</sup> *The Nicaragua Case*, ICJ, 1986, 44 para 73

The *Nicaragua Case* has shown that the Court was willing to admit and make use of evidence not formally submitted by the parties. However, the extraordinary nature of the case where one party did not appear before the Court must be noted. Further, this very open approach to the admission of information has not been reflected in other contentious cases.

Preliminary conclusion on the approach of the Court in contentious cases:

The jurisprudence of the Court on contentious cases has shown that it has allowed *amicus curiae* submissions on very few occasions. It has adhered closely to its Statute and the Rules in limiting the submissions to public international organizations, with the exception of the *Corfu Channel Case*. The Court has consulted a limited number of international organizations but the ICAO has been the only one that has really played a role.

#### 3.3.3.2 Advisory Opinions:

In addition to the contentious cases examined, this section will study the jurisprudence of the Court on advisory opinions. What must be noted is that according to the Statute, States and international organizations can submit information to the Court. The debate in this section focuses on submissions from entities not explicitly mentioned in the Statute.

##### *International Status of the South-West Africa Case:*

The first advisory opinion in which the question of *amicus curiae* briefs arose, and perhaps the most known in this regard, was the *International Status of South-West Africa Case*. The case concerned the status of the Territory of South-West Africa. The Territory was German prior to World War I. After the War, the Territory was placed under a Mandate conferred upon the Union of South Africa which had full power of administration and legislation over the Territory as a part of the Union. The question before the Court was whether, after the Second World War, the Mandate had lapsed, and whether the Union of South Africa could integrate the Territory into the Union.

In this case, the Court allowed an NGO, the International League for the Rights of Man, to submit information pursuant to Article 66(2) of the Statute<sup>310</sup>. The League had made a case for the submission of information to the Court referring to its history including: a) its long interest in the subject including its participation in the General Assembly's Fourth Committee, b) its possession of legal material, resources and research background, c) its status as an international human rights organization with ECOSOC consultative status<sup>311</sup>. The Court stated that the League had to submit a written statement limited to legal questions, and excluding facts not before the Court, within 25 days<sup>312</sup>. However, the League did not meet this time limit but submitted the information one month later and was consequently excluded from the proceedings<sup>313</sup>. Following this delay of submission by the League, the Court later refused a request from the League for oral submissions<sup>314</sup>. The Court also refused submissions from other entities in this case, for example, those from Rev. Michael Sit who was involved with the League of the Rights of Man's submission.

What this case shows is perhaps, *prima facie*, that the Court was willing to admit information from an international organization such as the League for the Rights of Man. However, after its late submission, could it be that the Court has changed its position and view *amicus curiae* briefs in a more unfavourable light?

#### *Namibia Case:*

There were also requests to submit information to the Court in the *Namibia Case*. The case concerned the question of the legal consequences for States of the continued presence of South Africa in Namibia notwithstanding Security Council resolution 276 (1970) which had stated South Africa's presence to be illegal.

In this case, there were requests from the League for the Rights of Man and the American Committee on Africa to submit a written and an oral statement, but both of them were not permitted by the Court. The statement of the League dealt directly with the question put by the Security Council Resolution 284 to the Court regarding the legal consequences for States of the continued presence of South Africa in

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<sup>310</sup> The request was made by Delson, a League board member: *International Status of South-West Africa*, ICJ, 1950, 324

<sup>311</sup> See further: Bartholomeusz, (2005) 220

<sup>312</sup> *International Status of South-West Africa*, ICJ, 1950 ICJ Pleadings, 327

<sup>313</sup> *International Status of South-West Africa*, ICJ, 1950 ICJ Pleadings, 346

<sup>314</sup> *International Status of South-West Africa*, ICJ, 1950 ICJ Pleadings, 343-344, 346

Namibia<sup>315</sup>. However, the Registrar stated that the Court had decided that the League's request "should not be acceded to"<sup>316</sup>. The Registrar added his personal view that the Court would be "unwilling to open the floodgates to what might be a vast amount of proffered assistance"<sup>317</sup>.

In the same case, the Court also received an application to participate from four inhabitants of the international Territory of South West Africa. Their request to the Registrar stated: "It is imperative that we as a Namibia Nation...be heard by the International Court of Justice....the Court conferred a *special legal interest* upon the people of South West Africa (Namibia)."<sup>318</sup> However, the Court refused the application.

Further, an international law professor from the United States, Prof. Riesman, also sought to submit an *amicus curiae* brief to the Court. The professor argued in support of his submission by referring to the practice of the Court of accepting a submission from the League for the Rights of Man in 1950 and also the practice in the Common Law Tradition<sup>319</sup>. Prof. Riesman argued that there was no explicit prohibition in the Statute or the Rules against the Court accepting information from interest groups or individuals, having noted that they cannot initiate a case or plead orally<sup>320</sup>. The Registrar refused to accept the brief from the professor because individuals did not fall within the definition of "international organization" in Article 66 of the Statute<sup>321</sup>. The Registrar further enunciated that Court's acceptance of information from the League for the Rights of Man in 1950 was on the basis of it being an international organization: "With reference to your suggestion that there seems to be no explicit bar...to accepting a document from an interested group or individual...the Court's view would seem to have been that the expression of its powers in Article 66...is limitative, and that *expressio unius est exclusion alterius*."<sup>322</sup>

The *Namibia Case* has shown the Court's reluctance to admit *amicus curiae* briefs, even from the League for the Rights of Man which had previously been

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<sup>315</sup> The statement dealt with legal questions. For full statement, see: Rovine and D'Amato, (1971)

<sup>316</sup> On the League for the Rights of Man: *Namibia Case*, ICJ, 1971 ICJ Pleadings, Vol II, 636-640; on the American Committee on Africa: ICJ Pleadings, Vol II, 643, 639-640.

<sup>317</sup> *Namibia Case*, ICJ, 1971, ICJ Pleadings 1971, Vol. II, 639. However, Bartholomeusz has suggested that, at the time that the Court had stated this, the Court was not overwhelmed with cases. This begs more questions as what could be other factors that could be the Court's refusal of *amicus curiae* from individuals.

<sup>318</sup> *Namibia Case*, ICJ, 1971 ICJ Pleadings 1971, Vol II, 677. Quote as noted by Bartholomeusz, (2005) 219

<sup>319</sup> Letter from Prof. Reisman to the Registrar, 10 September 1970, *Namibia Case*, ICJ, 1971 ICJ Pleadings 1971, Vol. II, 636-637

<sup>320</sup> Letter from Prof. Reisman to the Registrar, 10 September 1970, *Namibia Case*, ICJ, 1971 ICJ Pleadings 1971, Vol. II, 636-637

<sup>321</sup> Letter from the Registrar to Prof. Reisman, 6 November 1970, *Namibia Case*, ICJ, 1971, ICJ Pleadings 1971, Vol. II, 638-639

<sup>322</sup> Letter from the Registrar to Prof. Reisman, 6 November 1970, *Namibia Case*, ICJ, 1971, ICJ Pleadings 1971, Vol. II, 639



allowed to submit. The Court has applied Article 66 of the Statute very narrowly. Could this be a result of the delayed submission in the *International Status of South-West Africa Case*, causing the Court to look at such briefs in an unfavourable way?

Other cases:

There have been further attempts in the history of the Court by non-parties to submit briefs. In the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict Case*, the International Physicians for the Prevention of Nuclear War requested to submit information to the Court. In reply, the Registrar wrote a letter stating that the Court had considered the offer from the organization, remarking on its special relationship with the World Health Organization. However, the Court did not accept the submission from the organization having considered the circumstances of the case and the scope of the request from the WHO<sup>323</sup>. However, the Court had a chance to use their submissions in an informal manner. Ascensio, referring to a letter from the Registrar published in a newspaper, indicated that the submissions of the various NGOs were made available to the Court. This was done in an informal manner and there were no references made in the judgment<sup>324</sup>.

The narrow approach on the admissions of *amicus curiae* briefs was confirmed in two more cases.

First, in the *Effects of Awards of Compensation made by the United Nations Administrative Tribunal Case*, the lawyers who had presented the case of the staff before the Administrative Tribunal requested to participate in the advisory opinion proceedings in the oral arguments. They argued that their clients were directly affected by the judgment of the Court. However, the Court did not permit the participation of the lawyers because they were considered to be individuals<sup>325</sup>. The Court also did not allow the Federation of International Civil Servants to submit its views. The Registrar rejected the Federation's application on the ground that the organization was not an "international organization"<sup>326</sup>.

Second, the inability of individuals to submit *amicus curiae* was again confirmed in the *Judgments of the Administrative Tribunal of ILO upon Complaints*

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<sup>323</sup> Letter from the Registrar to Dr. Barry D. Levy, see: Shelton, (2006) 13.

<sup>324</sup> Ascensio, (2001) 906

<sup>325</sup> *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, ICJ, 1954, ICJ Pleadings, 394-395

<sup>326</sup> The Federation did not have a consultative status in the Economic and Social Council, Razzaque, (2002) 174

*made against UNESCO Case*. The issue referred to the ICJ involved the questioning of the validity of the Administrative Tribunal's decision. In this case, there was a special arrangement made between the Court and UNESCO to transmit the views of the staff members' Counsel through UNESCO to the Court. This was to ensure equality of the Parties and to prevent only one party (the international organization) being able to present submissions before the Court<sup>327</sup>. The Court commented on the inequality between the parties: "The individual will have to be dependent on the Organization (i.e. UNESCO) who was their opponent in the disputes before the administrative tribunal for the presentation of their views in the court. In order to provide some equality, the court dispensed with oral proceedings in the present advisory case."<sup>328</sup>

From the jurisprudence up to this point, Bartholomeusz has noted that the approach of the Court has changed from lenient to strict<sup>329</sup>. He has provided some explanation for this. The Court has to take into consideration the following: a) the question of whether the organization was likely to furnish accurate information, b) the worry of opening floodgates for NGOs, c) the question of whether "international organization" should be limited to public international organizations according to the meaning in Article 34 of the Statute<sup>330</sup>.

#### Recent developments:

Recent developments have shown that the Court could be leaving its narrow approach and going towards a more open approach on the admission of *amicus curiae* briefs. The Palestinian Wall Case is important in this regard. The question before the Court concerned the construction of a wall by Israel in Palestinian occupied territory. Regarding *amicus curiae* briefs, the debate surrounded the ability of Palestine to submit information to the Court because it is neither a State nor an international organization. Despite the controversy, the ICJ, understandably in the circumstances, requested Palestine to make submissions. However, the legal basis for the submission raises questions.

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<sup>327</sup> See further: Bartholomeusz, (2005) 225 and Chinkin, (1993) 325

<sup>328</sup> Razzaque, (2002) 174; Allowing the oral proceedings would have meant that only UNESCO could have appeared before the Court.

<sup>329</sup> The writer shares the same views as Bartholomeusz. A balance must be struck between these considerations.

<sup>330</sup> Compare the definition of international organization in Article 34 of the Statute of the Court to Article 71 of the UN Charter. See further: Bartholomeusz, (2005) 221

The Court has not directly addressed this issue but said that what must be taken into account are: a) Resolution ES-10/14, b) the report of the Secretary-General transmitted with the request for the advisory opinion, c) the fact that the General Assembly has granted Palestine a special status of observer, d) Palestine was co-sponsor of the draft resolution requesting the advisory opinion. The Court ruled that for these reasons, “Palestine might also submit a written statement on the question within the above time-limit”<sup>331</sup>.

Further, international organizations were also allowed to participate in advisory proceedings. In the *Wall Case*, two international organizations’ requests to intervene were accepted by the Court<sup>332</sup>, despite the fact this is not explicitly permitted by the Statute which only allows requests from States<sup>333</sup>. This again shows the increase in the willingness of the Court to admit *amicus curiae* briefs in advisory proceedings.

#### Other developments:

The recent Practice Direction XII of 2004 further supports the view that the Court is more willing to open its doors to *amicus curiae* briefs, or at least more aware of the issue. Even though the Practice Direction does not specifically allow NGO’s submissions to be part of the case file, it does set out the relationship between the Court and NGOs. Practice Direction XII states:

1. Where an international non-governmental organization submits a written statement and/or document in an advisory opinion case on its own initiative, such statement and/or document is not to be considered part of the case file.

2. Such statements and/or documents shall be treated as publications readily available and may accordingly be referred to by States and intergovernmental organizations presenting written and oral statements in the case in the same manner as publications in the public domain.

3. Written statements and/or documents submitted by international non-governmental organizations will be placed in a designated location in the Peace Palace. All States as well as intergovernmental organizations presenting written or oral statements under Article 66 of the Statute will be informed as to the location

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<sup>331</sup> *Wall Case*, ICJ, 2004 para 4. cf. *Applicability of the Obligation to Arbitrate under Section 21*, ICJ, 1988.

<sup>332</sup> The League of Arab States and the Organization of the Islamic Conferences.

<sup>333</sup> Article 66(2) and 66(3)

where statements and/or documents submitted by international non-governmental organizations may be consulted.

The Practice Direction has already raised questions and criticisms on many issues<sup>334</sup>: a) the definition of an “international nongovernmental organization”, b) whether the procedures in the Practice Direction are the exclusive way through which an NGO can participate before the Court, c) whether the Practice Direction could be extended to include contentious cases, d) the extent to which the Practice Direction could function effectively in practice<sup>335</sup>. These questions remain unanswered. Nonetheless, legal scholars have commented that despite its lack of clarity, the Practice Direction does show recognition that NGOs have an interest in advisory proceedings<sup>336</sup>. The Court still retains the discretion whether to refer to the NGO submissions<sup>337</sup>, and even if the Court does make use of them, there is no requirement for the Court to stipulate this in the judgment.

Preliminary Conclusion on the Court’s approach in advisory opinions:

In contrast to contentious cases, the Court has been relatively more open to *amicus curiae* in advisory proceedings. In addition to submissions of States and international organizations which are provided for in the provisions, the Court has allowed a submission in the *International Status of South West Africa Case*, but seemed to have changed its policy after this case. However, in recent times, the Court has opened up possibilities for *amicus curiae* submissions as shown in the *Wall Case* and Practice Direction XII. The Court has recognized that advisory opinion cases have a wider impact and affect the interests of many non-State entities.

#### 3.3.4 Interviews with the judges:

Interviews with three judges of the ICJ have confirmed many observations from the jurisprudence. Judge A has indicated that the issue of *amicus curiae* submissions is not discussed in detail at the Court. In his time as a judge, this issue has only been discussed once or twice.

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<sup>334</sup> Shelton, (2006) 1

<sup>335</sup> See further: Shelton, (2006) 18

<sup>336</sup> See further: Bartholomeusz, (2005) 223

<sup>337</sup> According to the Practice Direction, parties can consult the submissions. If this is the case and the information is included by the parties, then the Court would have to take this into consideration.

Regarding contentious cases, all three judges stated that the position of the Court has been quite closed. Judge B noted that the Court's approach to the admission of *amicus curiae* briefs has adhered closely to the Statute, and added that the Court is a long way off the admission of such briefs in contentious cases. However, he added that this is of no significance because non-States entities are generally not interested in contentious cases. The parties with a stake in such disputes are the States themselves. Judge C underlined the fact that, because of the closed position the Court, there could be a potential problem when the real parties to a dispute (i.e. when they are not States) cannot appear before it. This could be an inherent problem with the Statute.

However, regarding advisory opinions, Judge C has noted that the Court has generally refused *amicus curiae* briefs from entities not stipulated in the Statute. However, Judge B stated that the Court is generally opening up<sup>338</sup>. According him, this has been going on even before the *Wall Case*. But in the opening up process, the Court must be consistent with the Statute. This policy of the Court has been driven by the desire to grant the opportunity to non-State actors to be represented, as supposed to the desire to have additional arguments from these entities. However, with regard to the *Wall Case*, Judge A noted that Palestine was nearly a State for the purpose of the submission, so it cannot be said this case opened the doors of the Court.

In the context of both contentious cases and advisory opinions, as a matter of policy, Judge C stated that there are occasions where the Court would benefit from *amicus curiae* briefs, and also occasions where *amicus curiae* briefs would burden the Court. Judge A expressed his view that the Court should open up for *amicus curiae*. However, there are other members of the bench who do not share this view. Judge A further added that, regarding *amicus curiae* briefs, the composition of the Court can have an impact on the approach of the Court. Further, with the current composition, Judge A thinks that the approach of the Court will probably open up.

### 3.4 Conclusion:

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<sup>338</sup> Judge B also thought that this is a phenomenon taking place with other tribunals.

The provisions, jurisprudence and interviews have shown that, in both contentious and advisory opinions, the Court has generally been reluctant to admit *amicus curiae* briefs.

Regarding contentious cases, the provisions of the Court only allow submissions from “public international organizations”, defining the term as “an organization of States”. The practice of the Court has to a large extent reflected this. So far, there have only been requests to, and submissions from, public international organizations and none from NGOs.

As for advisory opinions, in addition to submissions from States and public international organizations, the Court was initially open to submissions from NGOs: the International League for the Rights of Man. However, following the failure of the League to submit the brief in time, the Court seemed to have closed its doors, refusing the League’s further requests for submissions, and many submissions by NGOs and individuals after this case.

However, recent developments have shown that the Court is beginning to be more open to *amicus curiae* submissions. This was supported by: (a) in many people’s opinions, the *Wall Case*, where information was submitted from Palestine, (b) Practice Direction XII submissions of NGOs, recognizing their interest in cases before the Court. The Court’s more open approach in advisory opinions raises questions of the possibility of it being extended to contentious cases.

One aim of this section is to explain the factors affecting the Court’s approach on *amicus curiae* briefs. One reason mentioned by Judge A is the composition of the bench. In his opinion, the current composition would probably lead to a more open approach on the issue. However, other reasons will be best understood in the overall conclusion when all the three tribunals and all three aspects of evidential rules will be examined together<sup>339</sup>. There will then be benefits from a more complete picture and a comparative analysis.

The debate on the topic continues<sup>340</sup>. Some argue for the Court to admit as much information from *amicus curiae* as possible, showing the Court’s recognition that its decisions have a wide impact. This will also enhance the legitimacy of the Court, promote the Court’s image, and help the Court reach a decision which is more

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<sup>339</sup> See: Chapter 7, Section 2, 248-256

<sup>340</sup> See further: Shelton, (2006) 19-23, Rosenne, (1997) 654-655, Vol. II, Jurisdiction; Razzaque, (2002) 175

“balanced”. In contrast, some argue that the Court is already overloaded with work and cannot cope with information.

For the writer, the Court has to find a balance between, on one hand, the desire to process the cases as rapidly and efficiently as possible, and on the other hand, the desire to have as much information as possible as well as granting the opportunity for non-State entities to be represented. In doing this, the Court has to consider the views of States whether they want non-State entities to participate.

## Section 4: ITLOS:

### 4.1 Introduction:

Similar to the ICJ, the drafting history of ITLOS has shown that it was created to serve the needs of States and not other entities. “Discussion about access by entities other than States under the prospective Rules never contemplated access by NGOs or individuals to Tribunal proceedings.”<sup>341</sup>

As noted previously, the provisions of ITLOS are modeled on those of the ICJ. The Preparatory Commission took into account “available precedents, such as those of the International Court of Justice and the Court of Justice of the European Economic Community [and] any interpretations the Courts had given in the application of their Rules, as well as the need to ensure that the procedures should be expeditious, not unduly expensive to the parties and should encourage resort to the International Tribunal for the settlement of disputes.”<sup>342</sup>

### 4.2 The provisions of ITLOS:

#### 4.2.1 Contentious Cases:

From the wording of ITLOS’s provisions, it is apparent that they were based on those of the ICJ. Article 84 of the ITLOS Rules was modeled on Article 34 of the ICJ Statute. Article 84(1) of the Rules stipulates that the Tribunal may request an appropriate intergovernmental organization to furnish relevant information. The Tribunal is to decide, after a consultation with the chief administrative officer of the organization, whether the information will be written or oral and any time limits will be set<sup>343</sup>. Similar to Article 34 of the ICJ Statute, an intergovernmental organization can also submit information on its own initiative. Further, if the construction of the

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<sup>341</sup> Bartholomeusz, (2005) 227. “In the case of the Tribunal only States Parties have the right of access in matters relating to application and interpretation of [UNCLOS]. This would include international organizations referred to in Annex IX in cases within their spheres of competence. In enjoying that right, intergovernmental organizations do so on behalf of and in the place of their Member States. Other entities only have the right of access to the Sea-Bed Disputes Chamber. Their access is limited to certain kinds of dispute.”, Statement by Chairman, Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea, Special Commission 4, Second Session, Doc. No. LOS/PCN/SCN.4/1984/CRP.4, 4 April 1984, para 3 in Platzöder, (1990) Vol. VII

<sup>342</sup> Draft Rules of the Tribunal (Prepared by the Secretariat): Explanatory Note, Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea, Special Commission 4, Doc. No. LOS/PCN/SCN.4/WP.2, 27 July 1984, para 2

<sup>343</sup> *Rules of ITLOS*, 2001 article 84(1)



constituent instrument of an intergovernmental organization or of an international convention adopted hereunder is in question, then the Registrar must inform that particular organization so that it may submit any relevant information<sup>344</sup>.

One difference between the ICJ's provisions and ITLOS's is the change from the term "public international organization" to "intergovernmental organization". "Intergovernmental organizations" restricts the types of organizations to only those between States, omitting any possibility of organizations with both State and non-State Members and NGOs submitting information to the Tribunal. The Rules also further define "intergovernmental organization" as an intergovernmental organization other than any organization which is a party or intervenes in the case concerned<sup>345</sup>.

In the writer's opinion, the main purpose of the change to the term "intergovernmental organization" was to clarify the definition much debated in the context of the ICJ<sup>346</sup>.

#### 4.2.2 Advisory Opinion:

ITLOS also contains provisions on the admission of *amicus curiae* briefs in advisory opinions. Rule 133 of the Rules addresses this issue and was modeled on Article 66 of the ICJ's Statute, resembling it for the most part<sup>347</sup>. However, it must be noted that ITLOS has the jurisdiction for advisory opinions only in the context of the Seabed Disputes Chamber. Similar to the ICJ, the Chamber must identify the intergovernmental organizations that are likely to be able to furnish information and make a request to such organizations<sup>348</sup>. State Parties and intergovernmental organizations will also be "invited to present written statements on the question within the time-limit fixed by the Chamber"<sup>349</sup>. The Chamber must also "decide whether oral proceedings shall be held and, if so, fix the date for the opening of such proceedings"<sup>350</sup>.

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<sup>344</sup> Rules of ITLOS, 2001 article 84(3)

<sup>345</sup> Rules of ITLOS, 2001 article 84(4)

<sup>346</sup> This term was later defined as an "organization of States" by the Court's Rules. See further on the drafting process of Article 84, see: Bartholomeusz, (2005) 229-230. The delegates did not intend for NGOs to be able to submit information to the Tribunal.

<sup>347</sup> Chairman's Summing up of the Discussions on the Draft Rules of the International Tribunal for the Law of the Sea, Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea, Special Commission 4, Doc. No. LOS/PCN/SCN.4/L.1, 10 July 1984, 6

<sup>348</sup> Rules of ITLOS, 2001 article 133 (2)

<sup>349</sup> Rules of ITLOS, 2001 art 133 (3)

<sup>350</sup> Rules of ITLOS, 2001 art 133 (4)

Among the many similarities, there are distinctions to be made between the provisions of ITLOS and those of the ICJ. First, under the Rules of ITLOS, all States can make submissions in advisory proceedings. This is to be contrasted with the ICJ's provision where only States likely to be able to furnish information on the question are permitted<sup>351</sup>. The change has made it easier for non-party States to submit information. Second, like Article 84 of the Rules of ITLOS on contentious cases, Article 133 also refers to "intergovernmental organizations"<sup>352</sup>. Again, this term rules out the possibility of international organizations with non-State members and NGOs from submitting information.

The provisions of ITLOS on advisory opinions do not mention whether State Parties or intergovernmental organizations can submit information on their own initiative. Scholars have argued that ITLOS would probably look to the rules and the practice of the ICJ which indicate that State Parties and intergovernmental organizations would be able to do so<sup>353</sup>. For example, in the *Wall Case*, the ICJ invited two international organizations to submit information in light of their earlier applications to the Court.

#### 4.2.3 Other provisions:

Similar to the ICJ, ITLOS also has provisions allowing it to arrange for an enquiry or expert opinion<sup>354</sup>. This provision could potentially be used to admit information that would otherwise be *amicus curiae* submissions. However, any information admitted through this channel is solely at the discretion of the Tribunal because it has to initiate the enquiry or expert opinion. As a result, NGOs will not be able to submit information on their own initiation.

However, it has been suggested that the article will not be used in this fashion because of three reasons<sup>355</sup>. First, the Tribunal will look at the practice of the ICJ which has never used its equivalent article for this purpose. Second, the Tribunal will take into account the background of the negotiations of UNCLOS. The Tribunal will

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<sup>351</sup> "Initially some delegations objected to this departure from the ICJ Statute, arguing that there would be "a danger that the urgency required for dealing with advisory opinions under UNCLOS could not be assured"", Bartholomeusz, (2005) 230

<sup>352</sup> Draft article 141 in the Final Draft Rules of the Tribunal, later to be article 133, still contained the term "international organization" but "intergovernmental organization" was chosen on the adoption of the Rules. Bartholomeusz, (2005) 231. This shows the restrictive view the delegates have taken towards submissions from such entities.

<sup>353</sup> Bartholomeusz, (2005) 231

<sup>354</sup> *Rules of ITLOS*, 2001 article 82; See also: Chapter 6, Section 4, 205-207

<sup>355</sup> Bartholomeusz, (2005) 232

be hesitant to permit entities not specifically provided for in the Convention to submit an *amicus curiae* brief. Third, in light of the urgent nature of the cases that have been before the Tribunal, admitting *amicus curiae* briefs could arguably be contradictory to Article 49 of the Rules which require the dispute settlement process to be conducted without unnecessary delay or expense.

Another provision that could arguably be used to admit *amicus curiae* briefs to the Tribunal is Article 289 of UNCLOS which provides for the appointment of experts<sup>356</sup>. However, this is also unlikely to be used. First, the article was intended more specifically for the appointment of experts who can provide help on technical issues. Second, according to the Rules, experts appointed under article 289 will also take part in the Tribunal's judicial deliberations. It is hard to imagine entities other than individual experts (e.g. NGOs) being able to participate.

#### 4.2.4 Preliminary Conclusion:

The provisions of ITLOS on *amicus curiae* are based on those of the ICJ, both for contentious cases and advisory opinions. On contentious cases, ITLOS's provisions resemble those of the ICJ apart from minor alterations. The Tribunal can request information from intergovernmental organizations, and they can also submit information on their own initiation. The notable difference between the provisions of the two tribunals is the term "public international organizations" used in the context of the ICJ, and "intergovernmental organizations" in the context of ITLOS.

With regard to advisory opinions, ITLOS's procedures, limited to the Seabed Disputes Chamber, once again resemble those of the ICJ. The Chamber is to identify the intergovernmental organizations that are likely to be able to furnish information and make requests to such organizations<sup>357</sup>. States and intergovernmental organizations are to be invited to present written statements. All States can make submissions to the Chamber, to be contrasted with the ICJ where only "States likely to be able to furnish information on the question" are permitted to submit. There are other provisions with potential to be used to admit information from *amicus curiae*: Article 82 of the Rules and Article 289 of UNCLOS. However, it is unlikely that they will be used in this way.

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<sup>356</sup> This provision was based on Article 50 of the ICJ Statute. See also: Chapter 6, Section 4, 205-207

<sup>357</sup> The term used is the narrower "intergovernmental organizations", and not "international organizations" as used by the ICJ.

#### 4.3 Practice of the Tribunal:

Unfortunately, the practice of ITLOS on *amicus curiae* briefs has been non-existent, depriving this section of the benefit of seeing the application of the provisions by the Tribunal.

The lack of jurisprudence on this issue is due to many reasons. First, there have not been many cases before the Tribunal, limiting the opportunities for entities to submit briefs. Second, the nature of the cases which have been before the Tribunal does not give rise to *amicus curiae* briefs: the majority has been prompt release cases. These cases are specific to the particular circumstances without a wider impact. There are also provisional measures cases. Again, these do not incite *amicus curiae* briefs. Allowing submissions at this stage would substantially slow down the process which needs to be dealt with quickly. *Amicus curiae* briefs are normally submitted at the merits phase where the facts and legal arguments are examined in more detail.

There were no *amicus curiae* briefs submitted in the only full merits case in the Tribunal's history, the *Saiga Case (No. 2)*, which was a continuation of a prompt release case. If other cases with a potential wider impact, such as the *Southern Bluefin Tuna Case* or the *Mox Plant Case*, had appeared before the Tribunal on their full merits, then the submission of *amicus curiae* briefs would have been much more likely.

Equally, there have not been any advisory opinions requested from the Tribunal, limiting the study in this regard.

#### 4.4 Interview with the judges:

The interview with the 7 judges of ITLOS has been revealing on the issue of *amicus curiae*. The judges agree that the Tribunal has discussed the admission of *amicus curiae* briefs, but there has not been clear agreement on the issue<sup>358</sup>. There were both judges who were for such submissions, and those who were against<sup>359</sup>.

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<sup>358</sup> Judge J

<sup>359</sup> Judge G said that the Tribunal would need more cases to determine whether the current rules are satisfactory.

The majority of judges interviewed expressed the view that the Tribunal is cautious<sup>360</sup>, and would be restrictive on the admission of *amicus curiae* briefs. Judge I stated that the Tribunal holds a conservative view that *amicus curiae* submissions have no place before it. They would be too much interference. Judge D stated that the general consensus has been that the Tribunal will follow the approach of the ICJ. Judge J added that, regarding NGOS, there is the legal hurdle that submissions from them are not provided in the instruments of the Tribunal. In contrast, Judge H had the general impression that the Tribunal concluded that *amicus curiae* briefs are desirable within the constraints of the rules<sup>361</sup>.

There were also mixed responses to the question of whether *amicus curiae* briefs would benefit the Tribunal. Judge H noted that *amicus curiae* briefs will be useful. Judge F has stated that this depended on the case. However, they can be very advantageous when used correctly. Judge E added that the probative value of the information from *amicus curiae* briefs is subject to the interpretation of the judge. Further, NGOs tend to have an ulterior motive, even those organizations that seem to be unbiased<sup>362</sup>, and the judge will take this into account. For this reason, Judge E stated that *amicus curiae* briefs would not make a substantial difference to the outcome of the case. Judge G added that *amicus curiae* briefs are good when used in the municipal context. However, in the international arena, they can be misleading. Too much influence on the Tribunal is not a good thing. Further, the Tribunal should apply law, minimizing the need for friends<sup>363</sup>.

As for the approach of the Tribunal in the coming future, there are also contradicting views among the judges. Judge E noted that, so far in its history, the Tribunal has not had the opportunity to admit *amicus curiae* brief. However, should there be an opportunity in the future, the Tribunal will probably do so. In contrast, Judge D said that the Tribunal will probably follow the approach of the ICJ in that it will not accept briefs for contentious cases but will do so for advisory opinions<sup>364</sup>. Judge G stated that, if the Tribunal is busy, or if the Tribunal is sitting in plenary, then it is unlikely to admit any briefs. However, if it is split into chambers to deal with different issues, or on certain issues such as the environment, *amicus curiae* briefs

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<sup>360</sup> Judge D, G, J

<sup>361</sup> Judge F shares this view.

<sup>362</sup> Also the view of Judge D

<sup>363</sup> Judge G

<sup>364</sup> The Tribunal tries as much as possible to avoid the fragmentation of international tribunals (Judge D)

would play a role. Judge D said that the Tribunal could expect *amicus curiae* briefs in some areas. For example, there could be submissions from organizations such as Greenpeace in prompt release cases involving questions on fishing.

Judge H supports the idea of *amicus curiae* briefs. Entities should be free to submit them. If the numbers of submissions are too great, the Tribunal doesn't have to read them because it must process cases efficiently. In his opinion, it is strange if the Tribunal is able to seek expert advice but cannot admit *amicus curiae* submissions. Seeking expert advice is asking people the Tribunal knows. What if there is information from people the Tribunal does not know? Judge H added that there should be some rules laid out to regulate *amicus curiae* submissions. According to him, NGOs should be encouraged to submit, and there is also potential for submissions from individuals.

Judge I also welcomes *amicus curiae* submissions and thinks that the Tribunal should open up. He stated that the views of non-States can be useful, but also noted that they can also come through the parties' submissions.

Judge J stated that if there were submissions, the judges would read them. The submissions would have influence on the judges, albeit subconsciously, but there would be no visible proof of this.

Regarding the factors that influence its approach, the Tribunal looks at the approach of other tribunals especially the ICJ<sup>365</sup>. However, it does not have to follow that particular approach<sup>366</sup>. Another constraint is the limited time<sup>367</sup>.

#### 4.5 Conclusion:

Because of the absence of jurisprudence of the Tribunal on *amicus curiae*, this section was restricted to the examination of the provisions and the interviews of the judges.

The provisions of the Tribunal are based on those of the ICJ. This is apparent in the context of contentious cases where the provisions of the two tribunals are very similar apart from the difference that the term "public international organization" used in the context of the ICJ has been changed to "intergovernmental organization". This

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<sup>365</sup> Judge J and D share this view.

<sup>366</sup> Judge J

<sup>367</sup> Judge G and J

change was implemented to clarify the much debated definition in the provisions of the ICJ and excludes NGOs and individuals from submitting briefs.

ITLOS's provisions on advisory opinions also resemble those of the ICJ. Again, the term "intergovernmental organization" is used in ITLOS's context, distinguishing it from the ICJ's "international organization". This arguably limits the scope of entities able to submit to ITLOS when compared to the ICJ. However, the scope for States to submit information has been increased by allowing all States to submit information in the case of ITLOS, rather than limiting submissions to only States which are likely to furnish information on the question.

The future of the approach of ITLOS on *amicus curiae* is still uncertain. The judges still seem to be divided. Some view *amicus curiae* briefs with much skepticism. Others think that the Tribunal should admit more briefs.

There seem to be many factors influencing the approach of the Tribunal. First, the history of the Tribunal has played an important role. The drafting of the Rules has shown that ITLOS has been influenced to a large extent by the ICJ. Second, the judges have expressed the opinion that they look at the practice of other international tribunals, especially the ICJ. Third, during the negotiation process, the intention of States, not wanting to permit NGOs to submit information, is still reflected in the provisions. Fourth, the time restriction upon the Tribunal in the prompt release and provisional measures cases has also meant that it was difficult for *amicus curiae* to be submitted.

The details of other influencing factors, which are also common to other aspects of evidential rules, will be left to the concluding chapter where all three tribunals will be examined together.

## Section 5: The WTO DSB:

### 5.1 Introduction:

The approach of the WTO DSB on *amicus curiae* differs from those of the ICJ and ITLOS. The issue has been controversial and much debated over recent years, with those who strongly support it, and those who do not<sup>368</sup>. One reason why there has been more debate in the WTO is that the disputes in this forum often concern the public at large, many stakeholders such as multinational corporations, and involve health or the environment. Further, there is more interaction between States and non-State entities than ever before<sup>369</sup>.

### 5.2 The Provisions of the WTO DSB:

The provisions of the WTO do not explicitly provide for the submission of *amicus curiae* briefs. During the negotiations of the WTO Agreement, proposals for the use of *amicus curiae* had been made but rejected at the Uruguay Round. Further, according to the accounts of most of the Members of the WTO<sup>370</sup> with the exception of the United States<sup>371</sup>, there was no consensus on the issue when it was suggested again at the DSU review<sup>372</sup>.

However, from the existing provisions, Article 13 of the DSU is the only provision that could arguably still be interpreted as allowing *amicus curiae* briefs. It provides: “each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate” and “panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter.” The way in which this article has been used will be examined in the next section.

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<sup>368</sup> President Bill Clinton is a supporter of *amicus curiae* briefs, as expressed in his statement on the occasion of the 50<sup>th</sup> Anniversary of GATT/WTO. He stated that stakeholders should be able to convey their views. WORLD TRADE WT/FIFTY/H/ST/8, 8 May 1998. See further: Bartholomeusz, (2005) 254-255, Umbrecht, (2001), Marceau and Stilwell, (2001), Boisson de Chazournes and Mbengue, (2003) 213-231

<sup>369</sup> On the relationship between the sovereign States and the interest of non-State actors, see generally: Hollis, (2002).

<sup>370</sup> WT/GC/M/60, General Council, Minutes of Meeting held on 22 November 2000, 23 January 2001, Similar accounts of the history of the negotiations were given by India, Mexico and Singapore, see: para 38, 50, and 60 accordingly.

<sup>371</sup> WT/GC/M/60, General Council, Minutes of Meeting held on 22 November 2000, 23 January 2001. “It was a mistake to claim that the negotiations history of the DSU showed any intent to ban *amicus curiae* submissions. In fact, the United States had at one point sought the language to clarify the DSU and made it explicit that such submissions would be permitted, but had become convinced that this was not necessary.” para 77

<sup>372</sup> As noted in Bartholomeusz, (2005); See WT/GC/M/60, General Council, Minutes of Meeting held on 22 November 2000, 23 January 2001, para 23 (Statement of Hong Kong, China).



### 5.3 The Practice of the WTO DSB:

At the outset, the WTO DSB did not admit any *amicus curiae* briefs, but followed the practice of its predecessor, the GATT<sup>373</sup>. However, this was to change only three years after its creation. In the *Shrimp/Turtle Case*, the question of how Article 13 of the DSU should be interpreted arose for the first time.

#### 5.3.1 *The Shrimp/Turtle Case*:

The *Shrimp/Turtle Case* was a dispute between a group of developing States on one hand<sup>374</sup>, and the United States on the other. It concerned the question of whether a law passed by the United States requiring importers of shrimps to fit turtle excluder devices on their shrimp trawlers was compatible with WTO obligations.

At the panel stage, three environmental NGOS submitted *amicus curiae* briefs on their own initiation: the Center for Marine Conservation ("CMC"), the Center for International Environmental Law ("CIEL"), and World Wide Fund for Nature<sup>375</sup>.

The Panel refused to admit the *amicus curiae* briefs, giving the following explanation: "We had not requested such information...We note that, pursuant to Article 13 of the DSU, the initiative to seek information and to select the source of information rests with the Panel. In any other situations, only parties and third parties are allowed to submit information directly to the Panel. Accepting non-requested information from non-governmental sources would be, in our opinion, incompatible with the provisions of the DSU as currently applied. We therefore informed the parties that we did not intend to take these documents into consideration. We observed, moreover, that it was usual practice for parties to put forward whatever documents they considered relevant to support their case and that, if any party in the present dispute wanted to put forward these documents, or parts of them, as part of their own submissions to the Panel, they were free to do so."<sup>376</sup> The United States did annex the NGO briefs to its submission.

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<sup>373</sup> Stern, (2003) 260

<sup>374</sup> India, Malaysia, Pakistan and Thailand

<sup>375</sup> *USA - Certain Shrimp and Shrimp Products Case*, WTO DSB, 1998 Report of the Appellate Body, para 99; Concerning briefs from the first two NGOs, the Panel acknowledged receiving them. The complaining parties requested the Panel not to consider them. In contrast, the United States urged the Panel to avail itself of any relevant information in the two briefs.

<sup>376</sup> *USA - Certain Shrimp and Shrimp Products Case*, WTO DSB, 1998, Panel Report, para 7.8

However, the Appellate Body overturned the ruling of the Panel on the interpretation of Article 13. In its own words: “Authority to seek information is not properly equated with a prohibition on accepting information which has been submitted without having been requested by a panel. A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not...The...authority vested in panels to shape the processes of fact finding...makes clear that a panel will not be deluged,...with non-requested material, unless that panel allows itself to be so deluged.”<sup>377</sup>

The AB further stated that the Panel was entitled to take into consideration the information provided by the NGO annexed to the submissions of the United States<sup>378</sup>. The AB considered that, by attaching the material to the submission, it became an integral part of the participant’s submission<sup>379</sup>.

The AB highlighted that the DSU must be interpreted flexibly: “It is pertinent to note that Article 12.1 of the DSU authorizes panels to depart from, or to add to, the Working Procedures set forth in Appendix 3 of the DSU, and in effect to develop their own Working Procedures, after consultation with the parties to the dispute. Article 12.2 goes on to direct that “[p]anel procedures should provide sufficient flexibility so as to ensure high-quality panel reports while not unduly delaying the panel process”<sup>380</sup>.

It is note worthy that the AB decided to accept for consideration the legal arguments made in the NGO’s briefs attached to the submission of the United States. These were submitted by three groups of NGOs<sup>381</sup>. In addition, the AB also accepted the revised version of the brief by the Center for International Environmental et al. which was not appended to a party’s submission. However, the AB did not state the reason for doing so<sup>382</sup>. In the Report, it did not refer directly to any of the *amicus curiae* briefs but did reach some conclusions which were suggested by them<sup>383</sup>.

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<sup>377</sup> *USA - Certain Shrimp and Shrimp Products Case*, WTO DSB, 1998, Report of the AB, para 108

<sup>378</sup> *USA - Certain Shrimp and Shrimp Products Case*, WTO DSB, 1998, Report of the AB, para 109, 110

<sup>379</sup> *USA - Certain Shrimp and Shrimp Products Case*, WTO DSB, 1998, Report of the AB, para 89

<sup>380</sup> *USA - Certain Shrimp and Shrimp Products Case*, WTO DSB, 1998 Report of the AB, para 105, also para 106

<sup>381</sup> The three groups include among them: a) first group: the Earth Institute, the Humane Society of the United States, and the Sierra Club, b) second group: Center for International Environmental Law (CIEL) the Centre for Marine Conservation, the Mangrove Action project, the Philippine Ecological Network and Sobrevivencia, c) third group: the Worldwide Fund for Nature and the International Environmental Law and Development. Based on arguments on teleological interpretation, one of the NGO groups argued that the panel erred in deciding that Article 13 of the DSU prohibits WTO panels from accepting non-requested information from NGOS. Malaysia argued that the appended briefs should be inadmissible in the appeal. The US argued that the views appended to the submission reflected their independent view.

<sup>382</sup> *USA - Certain Shrimp and Shrimp Products Case*, WTO DSB, 1998, Report of the AB, para 83, The admission of the non-annexed *amicus curiae* brief was criticized by Thailand: Dispute Settlement Body, Minutes of Meeting Held on 6 November 1998, WT/DSB/M/50, 14 December 1998, 2-3

<sup>383</sup> See further: *USA - Certain Shrimp and Shrimp Products Case*, WTO DSB, 1998, Report of the AB, para 17, 131, 152-154

Despite the open approach of admitting *amicus curiae* briefs, the AB still underlined the fact that the dispute settlement mechanism was for the Members: “Access to the dispute settlement process of the WTO is limited to Members of the WTO” and not to individuals or international organizations, whether governmental or non-governmental. “Only Members who are parties to a dispute, or who have notified their interest in becoming third parties...have a legal right to make submissions to, and have a legal right to have those submissions considered by, a panel.”<sup>384</sup>

#### 5.3.1.1 Reactions to the *Shrimp/Turtle Case*:

The overall reaction of the Members to the *Shrimp/Turtle Case*, as recorded in the minutes of the meeting of the DSB in November 1998, was negative towards the permission granted to allow the submission of uninvited *amicus curiae* briefs at the panel level. However, there was a minority of Members who supported the AB’s decision: the United States, Hong Kong, China<sup>385</sup>.

This meeting has also explained to an extent why the majority of the Members did not concur to the views of the AB<sup>386</sup>. First, many of the Members did not hold the view that the ability of the panel to “seek” information pursuant to Article 13 of the DSU extended to the acceptance of uninvited information, this being an interpretation that is arguably contrary to the ordinary meaning of “seek” as read in the context of the WTO Agreement<sup>387</sup>. Second, for some Members, accepting uninvited *amicus curiae* briefs, due to the promotion of the rights of NGO and non-Members, could lead to the diminishing of the Members’ rights, contrary to Article 19.2 of the DSU<sup>388</sup>. Third, too many *amicus curiae* briefs could overburden both the panels and the parties<sup>389</sup>. Fourth, the Members thought that it was for them to decide whether the panel could admit uninvited *amicus curiae* briefs, and not the Appellate Body<sup>390</sup>. India and Mexico also stated that they were against NGO participation in WTO proceedings in principle<sup>391</sup>.

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<sup>384</sup> *USA - Certain Shrimp and Shrimp Products Case*, WTO DSB, 1998, Report of the AB, para 101

<sup>385</sup> Dispute Settlement Body, (1998), 11 and 16

<sup>386</sup> Discussed in: Bartholomeusz, (2005) 257

<sup>387</sup> This view was argued by many Members: Dispute Settlement Body, (1998), 2-3,5,7,12,17

<sup>388</sup> Dispute Settlement Body, (1998), 3, 5, 10, 13, 17

<sup>389</sup> Dispute Settlement Body, (1998), 12, 16-17

<sup>390</sup> Dispute Settlement Body, (1998), 2, 13

<sup>391</sup> Dispute Settlement Body, (1998), 10 and 14

### 5.3.2 US – Lead Bars Case:

In the *US-Lead Bars Case*, the AB confirmed its ability to admit uninvited *amicus curiae* briefs and explained further the rationale behind its decision. The case concerned the imposition of countervailing duties by the United States on certain hot-rolled lead and bismuth carbon steel products originating from the United Kingdom.

The AB accepted that nothing in the DSU or Working Procedures specifically provides “that the Appellate Body may accept and consider submissions or briefs from sources other than the participants and third participants in an appeal.”<sup>392</sup> However, the provisions do not explicitly prohibit it either. The AB added that Article 17.9 of the DSU grants it the authority “to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements”<sup>393</sup> and continued, “we [the AB] are of the opinion that as long as we act consistently with the provisions of the DSU and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal.”<sup>394</sup>

Like in the *Shrimp/Turtle Case*, the AB re-enunciated the rights of Members and non-Members, and underlined that only Members have the legal right to participate as parties or third parties. “Non-Members have no legal right to make submissions to or to be heard by the Appellate Body. The Appellate Body has no legal duty to accept or consider unsolicited *amicus curiae* briefs submitted by individuals or organizations, not Members of the WTO.”<sup>395</sup> In this case, the AB did not find it necessary to take into account the two *amicus curiae* briefs received in rendering its decision<sup>396</sup>.

#### 5.3.2.1 Reactions after the *US-Lead Bars Case*:

In the DSB meeting after the *US-Lead Bars Case*, there were mixed reactions from the Members to the AB’s decision. The United States once again supported and “welcomed the Appellate Body’s findings on *amicus curiae* submissions”<sup>397</sup>.

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<sup>392</sup> *USA - Lead Bars Case*, WTO DSB, 1999, Report of the Appellate Body, para 39

<sup>393</sup> *USA - Lead Bars Case*, WTO DSB, 1999, Report of the Appellate Body, para 39

<sup>394</sup> *USA - Lead Bars Case*, WTO DSB, 1999, Report of the Appellate Body, para 39

<sup>395</sup> *USA - Lead Bars Case*, WTO DSB, 1999, Report of the Appellate Body, para 41

<sup>396</sup> *USA - Lead Bars Case*, WTO DSB, 1999, Report of the Appellate Body, para 42

<sup>397</sup> Dispute Settlement Body, (2000) 3

However, there were concerns by other Members. Some Members queried whether the authority of Article 17.9, which provides for the AB's ability to draw up working procedures, is enough as a legal basis for the acceptance and consideration of *amicus curiae* briefs<sup>398</sup>. Members also questioned whether and under what circumstances *amicus curiae* briefs are to be admitted to the WTO DSB<sup>399</sup> and commented that this issue should be left to the Members to decide<sup>400</sup>. There were further concerns about the position of developing States and stretching their already limited resources to make comments on *amicus curiae* briefs considered by the AB as relevant to the appeal<sup>401</sup>.

### 5.3.3 European Community-Asbestos Case:

The door to submit *amicus curiae* briefs remained open in the *EU-Asbestos Case*, perhaps the most controversial case on this issue in the history of the WTO. This dispute was between Canada and France involving a measure introduced by the latter to ban the importation of chrysotile asbestos on grounds of the protection of public health.

The AB went further than the previous two cases and, in addition to admitting *amicus curiae* briefs, provided guidelines for their submission<sup>402</sup>. The AB decided to consult the parties and the third parties regarding the possibility of establishing an *ad hoc* procedure to manage non-party submissions on appeal. In its own words: "we [the AB] recognized the possibility that we might receive submissions in this appeal from persons other than the parties and the third parties to this dispute, and stated that we were of the view that the fair and orderly conduct of this appeal could be facilitated by the adoption of appropriate procedures, for the purposes of this appeal only, pursuant to Rule 16(1) of the Working Procedures, to deal with any possible submissions received from such persons."<sup>403</sup>

The AB put questions to the parties and third parties including: a) whether the AB should adopt a "request for leave" procedure, b) "what procedures would be needed to ensure that the parties and third parties would have a full and adequate

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<sup>398</sup> Dispute Settlement Body, (2000) 4-8

<sup>399</sup> Dispute Settlement Body, (2000) 4-6

<sup>400</sup> Dispute Settlement Body, (2000) 4-6

<sup>401</sup> Dispute Settlement Body, (2000) 8

<sup>402</sup> The Panel received 5 written submissions from NGOs. It took two of these into account. *EC - Asbestos Case*, WTO DSB, 2001, Report of the Appellate Body, para 50

<sup>403</sup> *EC - Asbestos Case*, WTO DSB, 2001, Report of the Appellate Body, para 50

opportunity to respond to submissions that might be received.”<sup>404</sup>, c) whether there are any other points that were worth the AB’s consideration.

As response to these questions, “Canada, the European Communities and Brazil considered that issues pertaining to any such procedure should be dealt with by the WTO Members themselves. The United States welcomed adoption of a request for leave procedure, and Zimbabwe indicated that it had no specific reasons to oppose adoption of a request for leave procedure.”<sup>405</sup> After consultation involving all seven members of the AB, pursuant to Rule 16(1) of the Working Procedures, an additional procedure<sup>406</sup> was adopted, for the purposes of this appeal only, to deal with written submissions received from persons other than the parties and third parties<sup>407</sup>.

The Additional Procedure was communicated to the parties and third parties. The Chairman of the AB informed the Chairman of the DSU of the adoption of the Addition Procedures and this communication was also circulated to the Members of the WTO<sup>408</sup>. This communication stated that the Additional Procedures were for the purposes of this appeal only pursuant to Rule 16(1) of the Working Procedures for Appellate Review. It was not a new working procedure drawn up pursuant to Article 17(9) of the Understanding on Rules and Procedures Governing the Settlement of Disputes<sup>409</sup>.

An outline of the Additional Procedure is as follows. First, it states that any person, whether natural or legal, other than parties or third parties to the dispute, wishing to file an *amicus curiae* brief must apply for leave from the AB. The application must be made in writing and contain, *inter alia*: a) details on the applicant and its interest in the case, b) the identification of the issues that are subject to appeal, c) an indication of “what way the applicant will make a contribution to the resolution of this dispute that is not likely to be repetitive of what has been already submitted by a party or third party to this dispute”, d) a statement indicating whether the applicants have any relationship with the party or third party to the dispute. The AB has made it clear that the granting of leave to file a brief does not mean that the arguments of the applicants will be addressed. The Additional Procedure also sets out details the briefs

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<sup>404</sup> EC - Asbestos Case, WTO DSB, 2001, Report of the Appellate Body, para 50

<sup>405</sup> EC - Asbestos Case, WTO DSB, 2001, Report of the Appellate Body, para 50

<sup>406</sup> Later called the “Additional Procedure”

<sup>407</sup> EC - Asbestos Case, WTO DSB, 2001 para 51

<sup>408</sup> EC - Asbestos Case, WTO DSB, 2001 WT/DS135/9

<sup>409</sup> EC - Asbestos Case, WTO DSB, 2001 para 51

must satisfy, and guarantees the right of the parties and third parties to comment and respond to any briefs submitted.

The Additional Procedures has attracted some criticism<sup>410</sup>. First, not much time was given to the applicants, both for the request for leave and for preparing the written briefs. Second, the maximum length for the requests for leave and the briefs is too short, three pages and twenty pages being allowed respectively. Third, the threshold for granting leave is very high: the requirement of the applicants to indicate how their submissions would not be repetitive to those of the parties or third parties. This can be difficult unless the applicants had access to submissions of the parties and the third parties<sup>411</sup>. Fourth, the determination of who had the right to submit *amicus curiae* briefs could be subject to external pressures<sup>412</sup>. Fifth, the AB does not have to address the legal arguments in the applicants' brief. Sixth, because it is the appeal stage, the *amicus curiae* briefs are limited to the legal arguments. Finally, even though parties and third-parties have the right to make observations and comments on the *amicus curiae* submissions, this can be a difficult task for some Members<sup>413</sup>. The first five points mentioned have a result of making the position of the applicant NGO much weaker than that of the parties or third parties.

#### 5.3.3.1 Reaction to the Additional Procedures:

Even before the final decision of the AB, the Additional Procedures had already caused much controversy. A special meeting of the WTO General Council was held to address this issue. The summary of the meeting by the Chairman is of note. The Chairman said that "almost all delegations had made comments on the question of whether the Appellate Body or panels should receive or solicit amicus briefs."<sup>414</sup> Further, "there was a broad agreement that the rights and obligations under the DSU belongs to WTO members...[M]ost delegations had concluded that since there was no specific provision regarding amicus briefs, such briefs should not be accepted. Some delegations were of the view that amicus briefs could be used in some cases and there was at least one delegation who believed that there was both a legal and a substantive reason to use *amicus curiae* briefs. There was no agreement

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<sup>410</sup> Bartholomeusz, (2005) 261-262

<sup>411</sup> As noted by India: General Council, (2001) para 36; See further: Bartholomeusz, (2005) 261

<sup>412</sup> A comment made by Brazil: General Council, (2001) para 46

<sup>413</sup> Uruguay: General Council, (2001) para 7

<sup>414</sup> General Council, (2001) para 114

on this point.”<sup>415</sup> The Chairman continued to draw some conclusions: “First,...there had been a large sentiment expressed by almost all delegations that there was a need to consider whether it would be possible to put in place clear rules for amicus briefs. There might not be absolute unanimity on that point, but the majority of delegations had stated that the Appellate Body and the system would benefit from clearer rules...Second, in light of the views expressed and in the absence of clear rules,...the Appellate Body should exercise extreme caution in future cases until members had considered what rules were needed”<sup>416</sup>. Further, there was also concern that the Additional Procedure, allegedly specific to the *Asbestos Case*, would also set a precedent for future cases<sup>417</sup>.

#### 5.3.3.2 The decision of the AB in the *Asbestos Case*:

The Report of the AB came after the mentioned General Meeting. It rejected all of the received seventeen requests for leave: six were late and the other eleven did not comply with the criterion set out in paragraph 3 of the Additional Procedure<sup>418</sup>. Even though the doors for the submission of *amicus curiae* briefs seem open, this Report indicates that, in reality, it may not be the case<sup>419</sup>.

#### 5.3.4 *The European Communities-Sardines Case*:

For the purposes of this chapter, this case addressed the question of the possibility of a State acting as an *amicus curiae* as supposed to a party or third party. The case concerned a dispute between the EC and Peru on a measure adopted by the former on the labeling of tinned Sardines and the question of what species of fish could be labeled as such. The adopted EC measure only allowed one species of fish to be labeled as “sardines” whereas the international standard had also permitted other species to come under the same label.

The submission in question was an *amicus curiae* brief from the Kingdom of Morocco. The EC argued that the AB should treat submissions from Member States and those from private persons in the same way. However, Peru argued that the AB

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<sup>415</sup> General Council, (2001) para 114

<sup>416</sup> General Council, (2001) para 119

<sup>417</sup> General Council, (2001) para 20

<sup>418</sup> *EC - Asbestos Case*, WTO DSB, 2001 para 56

<sup>419</sup> Bartholomeusz, (2005) 263; Stern, (2003) 271



should not accept the brief of the Kingdom of Morocco because this would be bending the DSU's rules on the participation of Members in disputes<sup>420</sup>.

The AB decided that the Kingdom of Morocco could submit a brief. However, its rights will be the same as other *amicus curiae* and not the same as those Members who participate as third parties<sup>421</sup>.

Further, the AB confirmed its right to admit *amicus curiae* and referred to the *US-Lead Bars Case* that even though there was no provision which allowed the AB to admit submissions from sources other than the parties and the third-parties, there was no provision prohibiting it either<sup>422</sup>. According to the AB, there is to be no distinction between submissions from WTO Members not parties or third parties to the dispute on one hand, and those from non-WTO Members on the other<sup>423</sup>. In addition, the AB confirmed that there is no legal right for *amicus curiae* to submit information, and that it has no duty to accept any *amicus curiae* briefs<sup>424</sup>. Regarding the brief of Morocco, the AB considered that its submission principally concerned questions of fact which did not come within its mandate. However, some of the legal arguments concerning Article 2.1 of the TBT Agreement and the GATT were taken into account<sup>425</sup>.

### 5.3.5 Other Cases:

In the history of the WTO, there have also been occasions where *amicus curiae* briefs have been rejected. In some cases, the panel has simply ruled that it did not find it necessary to take the submission into account, but did not go into detail how it decided so<sup>426</sup>. In other cases, the panel gave specific reasons. For example, in the *EC-Sugar Subsidies Case*, the Panel decided "not to consider further the *amicus curiae* from WVZ because, *inter alia*, it is based on confidential information and is thus evidence of a breach of confidentiality which disqualifies the credibility of the authors."<sup>427</sup> At the Panel stage of the *EC-Asbestos Case*, one submission was rejected for being untimely<sup>428</sup>.

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<sup>420</sup> See further: Boisson de Chazournes and Mbengue, (2003) 236-238

<sup>421</sup> DSU, 1994 art 10.2 and 17.4

<sup>422</sup> *EC-Sardines Case*, WTO DSB, 2002, Report of the Appellate Body, para 162

<sup>423</sup> *EC-Sardines Case*, WTO DSB, 2002, Report of the Appellate Body, para 166

<sup>424</sup> *EC-Sardines Case*, WTO DSB, 2002, Report of the Appellate Body, para 166-167

<sup>425</sup> *EC-Sardines Case*, WTO DSB, 2002, Report of the Appellate Body, para 170

<sup>426</sup> E.g. *EC-Bed Linen*, WTO DSB, 2000, Panel Report, *EC - Asbestos Case*, WTO DSB, 2001, Panel Report, b) *USA - Copyright Act Case*, WTO DSB, 2000, Panel Report

<sup>427</sup> *EC - Sugars Case*, WTO DSB, 2005, Panel Report, para 2.20 and 7.76-85 of the report in complaint by Australia.

<sup>428</sup> *EC - Asbestos Case*, WTO DSB, 2001, Panel Report, para 8.12-14

There have also been *amicus curiae* submissions since the controversial *EC-Asbestos Case*. However, there has not been much development to clarify the legal standing of the WTO DSB on *amicus curiae* briefs. Where there have been submissions at the appeal level, in the majority of cases, the AB has admitted *amicus curiae* briefs but only to find that it was not necessary to take the briefs into account<sup>429</sup>. The Panels have taken a more cautious approach stating that it would only consider the arguments of an *amicus curiae* brief only to the extent that they were incorporated into the submissions of the parties<sup>430</sup>.

### 5.3.6 Preliminary Conclusion:

The practice of the WTO on the submission of *amicus curiae* briefs has been much debated. Starting with the *US-Shrimp/Turtle Case*, the AB allowed non-parties to submit *amicus curiae* briefs, stirring up reaction among the Members. The open approach taken by the AB continued in subsequent cases and the furthest the AB went was to set up the Additional Procedures regulating the way in which *amicus curiae* briefs were to be submitted in the *EC-Asbestos Case*. The Additional Procedure was again a much debated issue among the Members, with most of them questioning the authority of the AB to issue such procedures.

Consequently after the *EC-Asbestos Case*, there seems to be a deadlock in the WTO on this issue. Most of the Members consider the admission of *amicus curiae* submissions to be outside the scope of the AB and are against it. However, a few Members are in support. A consensus has not been reached. The AB is still admitting *amicus curiae* briefs but has been cautious in not using the submissions in its decisions<sup>431</sup>.

### 5.4 Interviews with the Panelists:

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<sup>429</sup> The cases where the AB has taken this approach include: a) *USA - Lumber CVDs Final Case*, WTO DSB, 2004, Report of the Appellate Body, para 9, b) *EC - Sugars Case*, WTO DSB, 2005, Report of the Appellate Body, para 9, c) *EC-Chicken Classification Case*, WTO DSB, 2005, Report of the Appellate Body, para 12, d) *Mexico-Soft Drinks Case*, WTO DSB, 2006, Report of the Appellate Body, para 8

<sup>430</sup> E.g.: a) *USA - Lumber CVDs Final Case*, WTO DSB, 2004, Panel Report, para 7.1, fn 75, b) *USA - Lumber ITC Investigation Case*, WTO DSB, 2004, Panel Report, para 7.10, fn 75. c) *USA - "Zeroing" Case*, WTO DSB, 2006, Panel Report, para 1.7

<sup>431</sup> With the exception of the *EC-Sardines Case* where the AB admitted and used to a limited extent the submissions from Morocco.

The interviews with the three panelists have been revealing. To the first question of what rules are applied by the panels, Panelist L noted that there is nothing precise in the DSU on this topic. So far, the rules have been created by the AB in their decisions and the panels follow the approach of the AB. When he was a panelist, the approach was to consider the *amicus curiae* submitted for a possible use in the case, but the panels were very careful in treating the *amicus curiae* brief. There can be biased motives behind a submission. In one case, it turned out that an NGO submission was linked to a lawyer for one of the parties who a key player in that particular NGO. Panelist L adds that, with the panels that he has been involved in, he tried to adopt as much of a consistent approach as possible.

Panelist K said that, when he was a panelist, *amicus curiae* briefs were widely accepted. However, they are generally ignored unless they are very compelling. There is a small chance that briefs would bring additional information to the panel because the arguments and the information provided are generally already covered by the submissions of the parties.

Panelist M stated that, during his time as a panelist, no *amicus curiae* briefs were submitted. However, he indicated that *amicus curiae* briefs are often used to promote the aims of NGOS. Nonetheless, he added that, in his opinion, *amicus curiae* briefs have an important role to play in the context of the WTO, referring to the information provided by Greenpeace in the *Shrimp/Turtle Case*.

On the treatment of *amicus curiae* briefs, Panelist L stated that the criteria determining which brief would be read changes from panel to panel, and very much depends on the individual panelists. For his panels, the neutrality of the submission is the determining factor. Once the panel agrees to read a submission, all three panelists would read it and discuss it. Some submissions are just thrown away because they were considered to be biased. There is of course the risk of missing out on information from not reading everything but doing so would take too much time. Further, Panelist L added that if a particular brief is read, then it would be very hard not to take it into account. In contrast, Panelist M said that he would read, to the extent possible, all the *amicus curiae* submissions. But the information provided therein will be subordinate to the submissions of the parties. He added that different *amicus curiae* would be granted different weight. For example, in a case concerning nuclear power, the panel would take seriously a submission from Greenpeace and even more so a submission from the atomic energy authorities.

Regarding what factors play a role in influencing the approach of the WTO DSB, the panelists stated that they must follow the approach established by the AB. Panelist L added that the debate on the *amicus curiae* has been a result of a clash of legal cultures. There is the Civil/Common law divide. From his experience, as a civil lawyer, Panelist L had a difficult time grasping the notion of an *amicus curiae*. At first, he could not distinguish between an *amicus curiae* brief and technical or expert advice, but soon became accustomed to it. Further, non-lawyers are also less aware of these technical issues<sup>432</sup>.

The panelists also gave a range of opinions as to the future of the *amicus curiae* brief in the WTO context. Panelist L expressed the view that the debate on *amicus curiae*, as a result of the clash of legal cultures, is not altogether a bad thing because it encourages an exchange of ideas and could further enhance the rules of the WTO DSB. However, the WTO DSB must find a balance in admitting the briefs because it does not want to be over-flooded with irrelevant material.

Panelist M noted that even though *amicus curiae* briefs can provide important information, there is also the risk of over-flooding the panels. This problem must be dealt with on a case by case basis. The WTO DSB should set the submission of *amicus curiae* briefs in a more formal context, establishing rules where necessary. Again, in doing so, a balance must be found.

Panelist K supports the use of *amicus curiae*. He noted that there have been arguments that *amicus curiae* briefs often support developed countries, and not developing countries. However, in his opinion, this is not necessary the case. He further added that if NGOs provide information that has not been provided by the parties, then the panel should take that into account. Panelist K stated that the approach of the WTO on *amicus curiae* briefs is good: the channels are open for entities to submit but there is still the absolute discretion whether or not to use the information. However, he noted that, from his experience, the evidence submitted by the parties is of higher quality from those from NGOs. Evidence from NGOs can be irrelevant. One reason is that the submissions of the parties are sometimes confidential, granting no access to the NGO, and making it difficult for the NGO to address the right issues.

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<sup>432</sup> Panelist M agrees with this view.

## 5.4 Conclusion:

The debate on the admission of *amicus curiae* submissions is still very alive today<sup>433</sup>. However, the scope of this section only concerns the practice of the WTO DSB and only the outline of the debate will be examined here. The issues much debated include: a) whether the AB was within its authority to make rulings on the issue and who should decide its future<sup>434</sup>, b) whether *amicus curiae* briefs would benefit the WTO system<sup>435</sup>, c) how should *amicus curiae* briefs be handled and developed<sup>436</sup>.

Little is said in the provisions of the WTO on *amicus curiae*. However, the development of the WTO DSB's approach can be followed from its jurisprudence. Upon its creation, the WTO DSB did not admit any *amicus curiae* briefs, following the practice of the GATT. But this is to change in the *Shrimp/Turtle Case* where, although first rejected by the panel, the AB allowed *amicus curiae* briefs for the first time. The briefs concerned the marine environment. This decision was controversial and sparked off mixed reactions among the Members. The AB confirmed this decision in the *US-Lead Bars Case* where it stated that there is nothing explicit in the provisions of the WTO to prevent it from admitting *amicus curiae* briefs. The AB went furthest in the *EC-Asbestos Case* where, as well as allowing *amicus curiae* briefs to be submitted, it established the Additional Procedure to deal with how *amicus curiae* submissions are to be submitted. This caused much controversy in the WTO granting a special meeting on the issue. However, a consensus could not be established. The current situation seems to be in stalemate but the AB has taken a cautious approach in that, although admitting *amicus curiae* briefs, it has ruled that it was not necessary to take them into account.

As for the factors that has had an influence on the WTO DSB, as in the other sections, the details will be left to the overall conclusion where there can be a comparative analysis of all three tribunals across three different aspects of evidence. This section will make a preliminary remark. From the jurisprudence and the

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<sup>433</sup> See: Umbricht, (2001) 783-790; Marceau and Stilwell, (2001); Boisson de Chazournes and Mbengue, (2003) 213-231

<sup>434</sup> Umbricht, (2001) 782

<sup>435</sup> For arguments, both for and against: Umbricht, (2001) 783-787. For only allowing *amicus curiae* at the panel only, see: Umbricht, (2001) 787-790. Pauwelyn argues for making cases public. This would also enhance the legitimacy of the WTO DSB: Pauwelyn, (2002) 329-330, and Bartholomeusz, (2005) 285. Howse argues that admitting *amicus curiae* briefs is a judicial right: Howse, (2000) 49

<sup>436</sup> Umbricht, (2001) 775, and Umbricht, (2001) 791-794. See further: Ala'i, (2001), an article examining the US experience on *amicus curiae* applying it to the WTO.

interviews, it is clear that the AB Members/Panelists play an important role. This is apparent from the lead which the AB has taken in allowing *amicus curiae* submissions and adopting the Additional Procedures. Second, an interviewed panelist has also suggested that there is a Civil/Common law divide. It can be difficult for civil lawyers to understand common law notions and vice versa. There are also non-lawyers as panelists who are not aware of technical legal issues such as evidential rules. Further, the Member States also have an influence on the approach of the WTO DSB. After the reaction from the Members to the *EC-Asbestos Case*, it is clear that their opinion does bear weight because of the much more cautious approach that both the panels and the AB took.

## Section 6: Overall Conclusion:

### 6.1 The existence of a common approach:

This chapter has shown that there is no common approach that the three tribunals take on the issue of *amicus curiae* submissions. In contentious cases, the ICJ stuck closely to the provisions and has not allowed any submissions from entities not therein provided. Even though provided for, the ICJ has also taken a restricted approach to submissions from international organizations. The Court has been more open regarding advisory opinions. The Court allowed an NGO to submit a brief in the *International Status of the South-West Africa Case* but it did not meet the time limit set. Thereafter, the Court seems to have taken a much more restrictive approach, but have arguably opened up in the recent the *Wall Case*. Interviews with judges also indicated that the ICJ will try to open up to *amicus curiae* submissions.

Regarding ITLOS, apart from a few differences in the terms used, its provisions are very similar to those of the ICJ. There are provisions for submission of briefs from intergovernmental organizations in contentious cases, and intergovernmental organizations and States in advisory opinions. However, there has not been any practice in its jurisprudence to indicate the way in which the Tribunal will apply these provisions. The interviews of the judges have indicated uncertainty. The majority of the judges stated that the Tribunal will take a cautious approach. However, there are also some who also think that the Tribunal will be willing to admit *amicus curiae* briefs. The future of the Tribunal's approach on *amicus curiae* is hence still uncertain.

As for the WTO DSB, in contrast to the ICJ and ITLOS, there are no clear provisions granting the use of *amicus curiae* briefs from any entity, not even international organizations. However, the jurisprudence has shown that the AB has been willing to admit *amicus curiae* briefs starting from the *Shrimp/Turtle Case* and carrying on to the *EC-Asbestos Case* where the Additional Procedure was created to regulate the way in which *amicus curiae* briefs were to be submitted. This caused much debate and controversy among the Members of the WTO. The current situation seems to be one of stalemate. The AB still admits *amicus curiae* briefs but has been careful in ruling that they are not necessary for reaching the decision. Unlike the ICJ

or ITLOS, the WTO DSB does not have the mandate to give advisory opinions and depriving this research of a comparison.

All three tribunals have to balance the efficiency of the tribunal with the benefits of gaining more information and having non-States represented. The tribunals have to take into account that the nature of international litigation is evolving. There has been a considerable increase in the number of non-State entities with interest in disputes at the international level. Consequently, there is arguably increasing pressure for the tribunals to admit *amicus curiae*.

## 6.2 Factors influencing the approach on *amicus curiae* briefs:

This section will begin to address the issue of what factors can influence the tribunals' approach on *amicus curiae* briefs. Because there could be factors which influence many aspects of evidential rules, the detailed study will be left to the overall conclusion of the thesis where there will be a comparative study of all the issues. This section will focus on the factors that have had an influence on rules on *amicus curiae* briefs.

The first influencing factor, apparent from the provisions of the tribunals, is the history and background of each tribunal. The provisions of the ICJ were based on those of the PCIJ. At the time of the PCIJ, non-States entities had a very limited role on the international plane. Any interests of non-States had to be represented by States on their behalf. Therefore, it is not surprising that the ICJ has adopted an approach restricting the participation of non-States. Further, from the provisions, it is apparent that those of ITLOS were based on those of the ICJ. The ICJ was used as a model, and consequently, ITLOS has acquired of its characteristics. As for the WTO DSB, the lack of provisions in the DSU was no doubt partly the result of the practice under the GATT which did not allow any *amicus curiae*. Should they have been allowed under the GATT, then the approach taken today could have been very different.

The second issue the tribunals had to consider was the administrative burden *amicus curiae* briefs could cause. This concern was apparent from the interviews. The tribunals have limited resources in terms of time and money<sup>437</sup>. They have to deal with the cases as efficiently as possible. *Amicus curiae* briefs can also be a

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<sup>437</sup> In the context of the ICJ, it has been suggested that there would still be the discretion to deny any submission if the workload is becoming overwhelming. See: Shelton, (2006) 14



burden on the litigating States<sup>438</sup> because they could need to submit comments on the briefs. This could deter States from using international tribunals if they do not have the resources to meet this task<sup>439</sup>.

The third influencing factor is the judges. This was indicated by the judges/panelists from all three tribunals in one way or another. For example, because of the current composition of judges, the ICJ is opening up to *amicus curiae* briefs. Further the judges can determine how ITLOS applies its provisions in the future. Each judge will bring with him his background and expertise.

The fourth influencing factor is the influence of States. This is very apparent in the context on the WTO. The debate whether the AB should have admitted *amicus curiae* briefs relates to the question of whether the decision should have been taken by the Members instead. The majority of Members hold the opinion that the question was one for the Members. As a result, the AB has taken notice and has been cautious on this issue.

### 6.3 Should there be a common approach on *amicus curiae* briefs?

One aspect of this thesis is to answer the question of whether there should be a common set of evidential rules for international tribunals. The detailed answer to this question will be left to the overall conclusion where all aspects of evidential rules in all three tribunals will be examined. However, this section will touch on the debate giving the reader the issues that are particularly pertinent to *amicus curiae* briefs.

The first point to note is that the issue of *amicus curiae* briefs is a policy to be determined by the tribunals. With the increasing role of non-State entities on the international plane, the question arises whether international tribunals should adopt a common approach to address this phenomenon.

The second point of note is that *amicus curiae* briefs can potentially affect the outcome of a case. They could supply the tribunal with crucial information or legal arguments otherwise not provided by the parties. Further, with the increasing number of tribunals and the potential for them to have overlapping jurisdiction over the same dispute, *amicus curiae* briefs could be a determining factor of the result of the case. In other words, if different tribunals adopt different rules on *amicus curiae* briefs as

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<sup>438</sup> See: Razzaque, (2002) 171

<sup>439</sup> Cf. Shelton, (2006) 15

shown above, there is room for inconsistent results from the same case before two different tribunals. The difference most easily identifiable is the distinction in the provisions of the ICJ and ITLOS on one hand, and the WTO DSB on the other. The ICJ and ITLOS allow for submissions in contentious cases from international organizations or intergovernmental organizations whereas the WTO DSB does not. There is also a distinction to be drawn on the approach to NGO submissions. From its history, the ICJ has not been willing to admit such briefs in contentious cases. This would equally apply to ITLOS should it decide to follow this approach. In contrast, among much controversy, the recent practice of the WTO has shown it has allowed the submission of information from NGOs, even if it has ruled that it was not necessary to take them into account. Consequently, there is potential for the WTO DSB to look at the submissions in an informal manner. Information could be taken into account through this informal channel even if it is not mentioned in the Report. This is in contrast with the ICJ where no information would be submitted at all.

The overall conclusion will address these issues in much more detail. It will examine whether, taking into account the nature of the tribunals and their history, it would be feasible to adopt a common approach on *amicus curiae* submissions as well as evidential rules as a whole. The conclusion will also go into the details of the advantages and disadvantages of commonality. Further, the question of how this can be implemented will also be addressed.

## Chapter Six: Expert Evidence

### Section 1: Introduction:

#### 1.1 Introduction:

The purpose of this chapter is to examine the way in which international tribunals obtain expert evidence, which is often needed in increasingly technical disputes with issues that stretch beyond the ability of the legally trained judges.

This chapter will examine the tribunals' instruments, jurisprudence and interviews with the judges. The general thesis of this research runs through this chapter, keeping three questions in mind: a) is there an emerging common approach on the use of expert evidence between the tribunals, b) what are the factors affecting the approach of the tribunals on expert evidence, c) should there be a common approach on expert evidence.

This section will be limited to the examination of contentious cases because all three tribunals have jurisdiction over them. The WTO DSB cannot be requested to give an advisory opinion. However, because of the lack of cases in ITLOS, provisional measures cases and prompt release cases will also be included.

#### 1.2 What are the functions of experts?

Experts are used to clarify technical issues beyond the expertise of the judge. They have an important role because the understanding of the issue could be fundamental to the outcome of the case. According to White, experts have a straightforward task to perform, "namely to assist the tribunal in the establishment or the elucidation of matters of fact, within the terms of the instructions given...by the tribunal"<sup>1</sup>.

Expert evidence can be communicated to international tribunals through various channels: a) incorporated as part of the written submission, b) experts can plead before the tribunal as counsel, c) experts can be called by the parties to testify, a

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<sup>1</sup> White, (1965) 163-164. White notes that, in certain contexts, experts can also perform a judicial role with the ability to render binding decisions on the parties.

process which would normally involve cross-examination, d) if provided for, tribunals can also appoint their own experts.

## Section 2: Municipal Courts

### 2.1 Introduction:

The aim of this section is to give an introduction to the way in which selected municipal jurisdictions admit expert evidence<sup>2</sup>. Because of limitations of resources, for the purposes of this chapter, legal systems in the same tradition have been grouped together. The approach of the Common Law jurisdictions has been grouped as one, and the Civil Law tradition as another. In reality, there will of course be variations within each legal tradition on their approach to expert evidence.

The difference often said to exist between the Civil Law and the Common Law traditions is that the former is an inquisitorial system and the latter an accusatorial system. The Civil Law system would normally leave the gathering of evidence, including the examination of experts to the judges while, in the Common Law system, the judge is seen as a referee for the parties and does not take an active role, but enforces the law objectively.

### 2.2 Civil Law Tradition:

In this tradition, the judge is crucial in the seeking of expert opinion. They “possess the widest powers to appoint experts and order inquiries of their own motion, irrespective of the consent of the parties”<sup>3</sup>.

In France, the Judge Delegate historically takes an active role in the procurement of evidence<sup>4</sup>. He has four techniques at his discretion, one being the request for expert assistance.<sup>5</sup> The use of expertise is limited to technical questions<sup>6</sup> and does not cover the establishment of facts. Experts are not allowed to enunciate the law or the legal effects of their findings<sup>7</sup>. The judge may commission any person

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<sup>2</sup> See generally on this issue: White, (1965)

<sup>3</sup> White, (1965) 14

<sup>4</sup> For the history of the French approach, see: Taylor, (1996) 186

<sup>5</sup> Seen further: Taylor, (1996) 189

<sup>6</sup> French “Nouveau Code de Procedure Civile”, art 232

<sup>7</sup> French “Nouveau Code de Procedure Civile”, art 238

to provide technical guidance by way of observations, consultation, or on a question of fact<sup>8</sup>. The Court usually appoints one single expert but can appoint more if necessary<sup>9</sup>. The expert is given a mandate to answer questions on a particular subject matter, and he is limited, with some exceptions, to giving his opinion on these questions. The parties may object to the appointment of an expert in some circumstances<sup>10</sup>.

In the context of France, Taylor suggests that it would be difficult for the judge to contradict an expert without relying on another<sup>11</sup>. The Court of Cassation has ruled that judges do not have to explain why they have accepted an expert's opinion. The appointment of experts is not a right of the parties but subject to judicial discretion<sup>12</sup>. However, a request for expert assistance can be from either of the parties, or initiated by the Court.<sup>13</sup>

The expert report is left with the Court when completed. Under normal circumstances, this would be the end of the expert's duties. However, the judges may require the experts to explain the findings more fully. They are questioned by the judges but there is no cross-examination from counsel. The report is given to both parties, at which point they can question its probative value, which is normally written with no oral argument<sup>14</sup>. Further, the Court of Appeal and the Court of Cassation hold a list from which experts can potentially be selected from.

In Germany, the trial judge is very much in control of the process concerning experts. The judge can call experts when he considers it to be appropriate. A party may propose a name of an expert but the judge is not obliged to call him. However, if both parties agree upon one expert, the Court must hear him but it can also appoint others. The role of experts in Germany is two-fold. First, he provides opinions and facts to the Court. However, in contrast to the Common Law Tradition, experts can also help the Court to draw conclusions. An oral examination also normally takes place.<sup>15</sup>

## 2.3 Common Law Tradition:

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<sup>8</sup> French "Nouveau Code de Procedure Civile", art 232

<sup>9</sup> French "Nouveau Code de Procedure Civile", art 264

<sup>10</sup> See further: White, (1965) 18

<sup>11</sup> Taylor, (1996) 209

<sup>12</sup> French "Nouveau Code de Procedure Civile", art 232

<sup>13</sup> French "Nouveau Code de Procedure Civile", art 143

<sup>14</sup> For details of the governing statute, see: Taylor, (1996)

<sup>15</sup> For procedures of other Civil Law jurisdictions, see: White, (1965) 19-20

In this tradition, it is generally up to the parties to present evidence to the judge who remains neutral, and acts more as a referee. According to English Common Law, opinion evidence is only admissible under two exceptions<sup>16</sup>, one of which is expert opinion proving “matters of specialized knowledge, on which the court would be unable properly to reach a conclusion unaided”<sup>17</sup>. “An expert’s opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary”<sup>18</sup>

In England, an expert is called by the parties. “The expert is primarily seen as an aide to the party who has organized that he or she should come to court”<sup>19</sup> They are generally “selected on the basis of a reasonable expectation that they will support the case of the party calling them.”<sup>20</sup> Because of the adversarial nature of the system, the experts are neither a random selection from a particular scientific community nor do they generally represent views of the majority<sup>21</sup>. An expert can present his opinion in many ways: expert reports, glossaries or oral testimonies<sup>22</sup>.

In addition to party appointed experts, the English Court can also appoint its own experts in civil proceedings but this power has hardly been used. This is still an issue much debated today<sup>23</sup>.

In the United States, the use of experts is provided for in the Federal Rules of Evidence<sup>24</sup>. A person may qualify as an expert “by knowledge, skill, experience, training or education” and they may be called “if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.”<sup>25</sup> McCormick noted that two elements are required for the use of expert testimony: a) the subject of the inference must be related to some science, profession, business or occupation as to be beyond the ken of the average

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<sup>16</sup> See further: Keane, (2006) 552

<sup>17</sup> Murphy, (1980) 302

<sup>18</sup> Dennis, (2002) 702 citing *Turner* [1975] Q.B. 834 at 841, CA.

<sup>19</sup> Nijboer, (1995) 558

<sup>20</sup> Dennis, (2002) 712

<sup>21</sup> Redmayne, (1997) 1067

<sup>22</sup> Browne, Williamson, and Barkacs, (2002) 80: On how the English system treats expert evidence, and a comparison with the United States. see: Browne, Williamson, and Barkacs, (2002) 75-91; Generally: Dennis, (2002) Chapter 20, Keane, (2006) Chapter 18

<sup>23</sup> See further: Dennis, (2002) 712

<sup>24</sup> Article 702-706; Mueller and Kirkpatrick, (1995) Chapter 7; Lempert and Saltzburg, (1984) Chapter 10; Letwin, (1986) Chapter 9

<sup>25</sup> Article 702

layman, b) the witness must have sufficient skill, knowledge or experience in that field<sup>26</sup>.

Like the English system, experts are normally called by the parties. However, the Court does have power to appoint its own experts<sup>27</sup>. Expert opinion does not bind the judge or the jury<sup>28</sup>.

International tribunals: The ICJ, WTO DSB, and ITLOS

### Section 3: The ICJ

#### 3.1 Introduction

The aim of this section is to examine the approach of the ICJ on expert evidence. However, at the outset, there will be an introduction to the use of expert evidence prior to the creation of the ICJ, especially the practice of the PCIJ, to understand the context in which the ICJ was created.

#### 3.2 The Early Development of the Use of Experts:

Expert evidence has been used since the earlier period of international litigation. From as early as 1907, in the Arbitration of Summary Procedure<sup>29</sup> of the Hague Convention for the Pacific Settlement of Disputes, Article 90 permitted each party to call experts. The tribunal would then be able to ask questions to both the parties and the experts as it considered useful. As revealed by the Report to the Conference of the First Commission of the Revision of the Convention of 1899, the purpose of this article was to address the settlement of technical difficulties<sup>30</sup>. However, the Arbitration of Summary Procedure was subject to party consent which unfortunately meant that Article 90 has never been used in cases decided by members

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<sup>26</sup> McCormick, (1972) Section 13, at 29-30

<sup>27</sup> Federal Rules on Evidence, Article 706

<sup>28</sup> See further: Lempert and Saltzburg, (1984) 862

<sup>29</sup> Chapter III of Part IV of the Convention. This applied in absence of other arrangements, and subject to some reservations.

<sup>30</sup> White, (1965) 35-36;

of the PCA<sup>31</sup>. However, it was used in *Lighthouses Arbitration (Affaire des Phares)*<sup>32</sup>.

Experts have been also been used in *ad hoc* international arbitrations. In the *Delagoa Bay Railroad Case*, between the United States and the United Kingdom on one hand, and Portugal on the other, provisions were made by the arbitrators for experts in the valuation of the compensation for the cancellation of a concession granted to complainants' citizens. The tribunal created a questionnaire for the experts. Three experts were used and their report was communicated to the parties for observations<sup>33</sup>.

In the *Behring Sea Fur Arbitration* in 1891 concerning the right of the nationals of the Parties to the seals in the Behring Sea, express provisions were made for a commission of experts in the *compromis*. Each government was to appoint two commissioners to investigate seal life in the area and suggest protecting measures. The commissioners visited the Behring Sea, and their report was presented to the arbitrators<sup>34</sup>.

In the *North Atlantic Fisheries Arbitration* of 1909, Great Britain and the United States submitted questions regarding an 1818 convention on fishing rights to an arbitral tribunal. The agreement provided for the use of experts by the tribunal in specific circumstances including, *inter alia*, if there were questions regarding the reasonableness of any regulation, or if expert information about the fisheries was required. According to the agreement, the tribunal was not bound by the findings of the experts<sup>35</sup>.

White noted that, in this early period, many agreements for the arbitration of boundary disputes, claims agreement, and general arbitration treaties contained provisions for the use of experts<sup>36</sup>. Two examples are: a) the Agreement of June 30, 1921, between the United States and Norway for the Submission to Arbitration of Certain of Norwegian Subjects, b) the Arbitration Protocol between France and Haiti of September 10, 1913.

### 3.3 The PCIJ:

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<sup>31</sup> White, (1965) 35-36;

<sup>32</sup> See further: White, (1965) 36

<sup>33</sup> See further: White, (1965) 49, 131-133

<sup>34</sup> See further: White, (1965) 151-154

<sup>35</sup> See further: White, (1965) 167-171

<sup>36</sup> See further: White, (1965) 50 et seq. White argues that the practice has indicated that there is an implied competence for international tribunals to appoint experts, White, (1965) Chapter 4



The PCIJ recognised the importance of experts<sup>37</sup>. Article 50 of the Statute stated: “the Court may, at any time, entrust any individual, body, bureau, commission or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.”<sup>38</sup> Article 51 further provided that questions may be put to the experts under conditions laid down by the Court. Article 57 of the Rules also provided for the Court to arrange for an expert enquiry or report, the results of which must be communicated to the parties.

During the lifetime of the PCIJ, the use of experts has not been frequent. The following are some examples. In the *German Interests in Polish Upper Silesia Case*<sup>39</sup>, both the German and the Polish Government used experts according to an order of the Court requesting further information on two of the proprietors of the agricultural estates in Polish Upper Silesia to be expropriated by the Polish government. The experts were questioned by the parties, the judges and the President.

In the *Oscar Chinn Case*<sup>40</sup> between Belgium and the United Kingdom involving the reduction of freight charges in the River Congo by a transport company in which the Belgian Government was the majority shareholder. The questions before the Court were whether the reduction was contrary to international law and what compensation was due. The United Kingdom requested an expert enquiry on the question of compensation. However, after considering the evidence presented, the Court ruled that the lowering of the sea freight was not contrary to Belgium’s international obligation, and consequently, it was not necessary to carry out the expert inquiry as previously requested<sup>41</sup>.

In the *Free Zones of Upper Savoy and the District of Gex Case*, a request was made by France for an expert enquiry. The Court rejected it on the basis that the judgment must be limited to questions of law<sup>42</sup>. However, experts were later used for a different purpose of drafting regulations on the relationship between France and Switzerland following the judgment.

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<sup>37</sup> See generally, White, (1965) 36-43

<sup>38</sup> For the history of the drafting the Statute of the Court, see: White, (1965) 36-39

<sup>39</sup> *German Interests Case*, PCIJ, 1925

<sup>40</sup> *The Oscar Chinn Case*, PCIJ, 1934

<sup>41</sup> There were dissenting opinions on the Court’s decision not to carry out the inquiry, stating that there was a need to have regard to all the circumstances of the case. See: White, (1965) 105-107.

<sup>42</sup> *Free Zones of Upper Savoy and the District of Gex*, PCIJ, 1932, 162

In the *Chorzow Factory (Claim for Indemnity) Case*<sup>43</sup>, the Court requested an expert enquiry according to Article 50 of the Statute regarding the amount of the indemnity to be paid by the Polish Government to the German Government. The Court considered the data from Germany on the assessment of the indemnity to be unsatisfactory. A Committee of three experts was appointed which included: a Norwegian consulting Engineer, a Swiss chief Engineer, and the managing director of a Norwegian carbide factory. The parties each appointed an assessor to take part in the inquiry. However, the Committee did not have the opportunity to perform its task because the parties reached agreement through other means<sup>44</sup>. The use of experts in this case influenced the discussions for the preparation of the 1936 Rules. The Registrar noted that the nature of the Committee was very particular to this dispute. Consequently, Article 57 of the Rules was drafted to give freedom to the Court to decide the details of an inquiry<sup>45</sup>.

As a preliminary conclusion on the use of experts prior to the creation of the ICJ, it must be first noted that experts were used by many fora, both *ad hoc* and by the PCIJ. However, apart from the provisions of the PCIJ, there were no fixed rules and it was up to the parties and the tribunal to agree on the mandate of the experts. The expert evidence also covered many different issues.

### 3.4 The ICJ:

#### 3.4.1 The provisions of the ICJ:

Like the PCIJ, the ICJ also recognises the importance of experts. The Statute of the ICJ is based on Statute of the PCIJ and also includes provisions for the use of experts. The Court has the power to seek information by inviting expert witnesses on its own initiative<sup>46</sup>, and can also request an enquiry or an expert opinion after hearing the parties.<sup>47</sup> The details of an enquiry or a request for an expert opinion are for the

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<sup>43</sup> *Chorzow Factory Case (Indemnity)*, PCIJ, 1928

<sup>44</sup> *Chorzow Factory Case (Indemnity)*, PCIJ, 1928 ser. C, No. 16-II at 14-15; On questions asked to the experts, see White, (1965) 129

<sup>45</sup> Sandifer, (1975) 333

<sup>46</sup> *Rules of Court*, 1978 art 62(2)

<sup>47</sup> *ICJ Statute*, 1945 art 50; *Rules of Court*, 1978 art 67(1)

Court to determine. The parties are given opportunities to comment on the findings of the enquiry or the expert opinion<sup>48</sup>.

In addition, there are provisions for experts to be introduced by the parties<sup>49</sup>. The Statute provides for the hearing of the experts during the oral proceedings<sup>50</sup>. If they intend to call experts, the parties have to communicate their intention to the Court. This communication must contain details of the experts including the general points on which they will be questioned<sup>51</sup>. The parties may call any experts on the list<sup>52</sup>. If at any time during the hearing, a party wishes to call an expert not included in that list, it must inform the Court and the other party, and must supply the information as required by Article 57 of the Rules. The expert may be called either if the other party makes no objection or if the Court is satisfied that his evidence seems likely to prove relevant<sup>53</sup>. The selected experts are subject to questions from the other party and the judges<sup>54</sup>. The method of the examination is to be settled by the Court after the views of the parties have been ascertained<sup>55</sup>.

The Court can also appoint assessors to help on specialised issues. They sit on the bench and participate in the deliberations, without voting rights<sup>56</sup>. The need for the assessors is determined by the Court, either on its own initiative or upon a request made by one of the parties<sup>57</sup>. The assessors are elected by the Court but none have been used so far in the Court's history.

Finally, Article 43 of the Statute permits parties to appoint experts as members of their delegation who can plead before the Court<sup>58</sup>. As a result, and noted by Rosenne, the distinction between counsel and expert is not always easily drawn<sup>59</sup>. Experts who are members of the delegation do not have to make a solemn declaration and they are not subject to cross-examination. However, the judges may ask these experts questions as they see fit.

### 3.4.2 The jurisprudence of the Court:

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<sup>48</sup> *Rules of Court*, 1978 art 67(2)

<sup>49</sup> *ICJ Statute*, 1945 art. 43(5); *Rules of Court*, 1978 art 63(1)

<sup>50</sup> *ICJ Statute*, 1945 art 43

<sup>51</sup> *Rules of Court*, 1978 art 57

<sup>52</sup> *Rules of Court*, 1978 art 57

<sup>53</sup> *Rules of Court*, 1978 art 63(1)

<sup>54</sup> *ICJ Statute*, 1945 art 51; *Rules of Court*, 1978 art 65

<sup>55</sup> *Rules of Court*, 1978 art 58(2)

<sup>56</sup> *ICJ Statute*, 1945 art 30(2); *Rules of Court*, 1978 art 9(1), (4)

<sup>57</sup> *Rules of Court*, 1978 art 9(1)

<sup>58</sup> Rosenne, (1997) 1183

<sup>59</sup> Rosenne, (1997) 1182

In the jurisprudence of the Court, experts have been used on many technical issues. The section includes a selection of the cases to give a cross-section of the jurisprudence. Because expert evidence can be used differently according to the subject matter of the dispute, the cases of the ICJ have been divided into those concerning: (a) Use of Force, (b) State Responsibility (excluding use of force), (c) Delimitation. Within these sections, the cases will be examined chronologically. At the outset, it is of note that the means through which expert evidence is most often submitted is the written submissions.

#### 3.4.2.1 The normal procedures carried out by the Court:

Expert evidence can be presented to the Court at many stages. First, the parties can include expert evidence in the written submissions. This is usually included as an annex. After the written pleadings have been submitted, there would be two rounds of oral pleadings, where expert evidence can be presented.

The procedure for the examination of the experts generally resembles the Common Law tradition with an examination in chief, cross-examination, and a re-examination. Rosenne has offered an explanation for the Court's approach. In the first case of the ICJ, the *Corfu Channel Case*, the witnesses were examined by the British delegation in the Common Law style and the pattern has remained for the ICJ ever since<sup>60</sup>. But the ICJ's rules are less strict than those of municipal courts. One member of each counsel would normally examine each expert but a different member can examine other experts if there is more than one. The judges can also put questions to the experts.

#### 3.4.2.2 Cases Involving the Use of Force:

##### 3.4.2.2.1 *The Corfu Channel Case*:

There was extensive use of experts in the *Corfu Channel Case*, but only in the last two stages: the merits and the determination of the damages owed by Albania to the United Kingdom, but not the preliminary objections.

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<sup>60</sup> Rosenne, (1995) 156

During the merits stage, the question before the Court was whether Albania was responsible under international law for the explosions in the Channel and the damage caused to British ships, and whether Albania had a duty to pay compensation. The United Kingdom called two witness-experts and Albania called two experts, all of whom were naval officers. There was an examination and cross-examination of the experts and questions were put by members of the Court.

However, after several points had been contested by the Parties, an expert opinion was considered necessary by the Court but without enunciating what criteria were used in deciding this. There was an Order of the Court appointing the experts which was drafted in consultation with the parties. The three experts were naval officers from Sweden, Denmark, and the Netherlands (appointed chairman). They were given a mandate to investigate issues which included the way in which the mines in the channel were laid and whether it was possible to do so without Albania's knowledge.<sup>61</sup> However, despite having the opportunity, the Parties did not opt to ask specific questions to the experts<sup>62</sup>. The mandate of the enquiry limited the experts to the questions submitted to them: the "experts shall bear in mind that their task is not to prepare a scientific or technical statement of the problems involved, but to give to the Court a precise and concrete opinion upon the points submitted to them"<sup>63</sup>. However, they were encourage to go into the details of their findings: the experts "shall not limit themselves to stating their findings; they will also, as far as possible, give the reasons for these findings in order to make their true significance apparent to the Court. If need be, they will mention any doubts or differences of opinion amongst them."<sup>64</sup> There were eight questions to be addressed, including the types of mines that struck the British ships.

The Court decided that the expert report submitted was not conclusive and further requested the experts to proceed to Sibenik in Yugoslavia and Saranda in Albania to investigate the surrounding areas to verify and obtain answers on certain issues, and if necessary, modify their answers<sup>65</sup>. The Court allowed the parties to suggest points which the investigation should address. On this visit, experiments were carried out on site with the aim to answering, *inter alia*, whether the mine-laying would have been observed by the Albanian look-out posts. The experts concluded

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<sup>61</sup> Order of 17 December, 1948. *Corfu Channel Case*, ICJ, 1949, 124, 126

<sup>62</sup> *Corfu Channel Case*, ICJ, 1949, 5 Pleadings 245

<sup>63</sup> *Corfu Channel Case*, ICJ, 1949, 126

<sup>64</sup> *Corfu Channel Case*, ICJ, 1949, 126

<sup>65</sup> Order of the Court on 17 January 1949

that if a normal look-out was kept with binoculars, under normal conditions, the mine-laying operation must have been noticed by the coast-guards.<sup>66</sup> The experts also gave opinions on other issues including when the mine was laid, where the ships were mined, and the type of mine the ship struck.

The Court relied on the information provided: “[it] cannot fail to give great weight to the opinion of Experts...From all the facts and observations mentioned above, the Court draws the conclusion that the laying of the minefield which caused the explosions...could not have been accomplished without the knowledge of the Albanian Government.”<sup>67</sup> The Court also submitted further questions to the experts concerning the mines.

In the final stage of the case, the question before the Court was the amount of compensation owed. Albania argued that, according to the Special Agreement submitted by the two parties, the Court was only to decide whether Albania was obliged to pay compensation, and not to fix the exact amount. However, the Court ruled that it had jurisdiction to do so. Consequently, Albania did not attend the proceedings determining the damages.

On Albania’s refusal to present its views and to appear at a hearing, the Court appointed its own experts pursuant to Article 50 of the Statute to examine the figures of compensation submitted by the United Kingdom. Two Dutch experts in naval construction and warships were appointed. They submitted their report, and were subsequently questioned on their findings by various judges.

The Court separated the compensation claim into three categories: the replacement of the destroyer *Saumarez*, the damage sustained by the destroyer *Volage*, and damages in relation to the death and injuries of the naval personnel. The Court used the estimate of the United Kingdom because, as viewed by the Court appointed experts, it was an exact and reasonable estimate<sup>68</sup>. The Court also held that the United Kingdom had produced sufficient proof of the damage sustained by the naval personnel. The experts submitted to the Court the method of calculation of the estimate of the amount owed by Albania to the United Kingdom, which was annexed to the judgment of the Court together with the records of the questioning of the experts.

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<sup>66</sup> *Corfu Channel Case*, ICJ, 1949, 21

<sup>67</sup> *Corfu Channel Case*, ICJ, 1949, 21, 22. See further: Lalive, (1950) 101

<sup>68</sup> *Corfu Channel Case*, ICJ, 1949, 249. The estimate of the Court’s experts was in fact sixteen thousand pounds higher than that of the United Kingdom.

#### 3.4.2.2.2 *Oil Platforms Case*:

The *Oil Platforms Case* concerned a dispute between Iran and the United States regarding an attack by several warships of the US Navy on three oil platforms owned by the National Iranian Oil Company. Iran claimed that the United States had breached provisions of the Treaty of Amity, Economic Relations and Consular Rights between the two States. The United States filed a counter-claim regarding the actions of Iran in the Gulf during 1987-1988 which involved the mining and attacks on United States vessels.

This case is a good contrast to the *Corfu Channel Case* showing the range of ways which expert evidence can be introduced. The expert evidence in this case was solely submitted in the written form from both parties. The United States submitted expert reports describing the images of the four missile sites from which Iran allegedly fired missiles on the Sea Isle City, and reports on the ability of the missiles. Iran also produced differing views through its own expert reports regarding the satellite images that had been previously produced by the United States.

During the proceedings, the United States expressed the intention to file a new document containing the analysis and explanations by its own experts concerning the evidence that had already been submitted, pursuant to Article 56 of the Rules<sup>69</sup>. Iran did not object and wanted to submit its own expert document which commented on the expert document of the United States.

Because of the contradiction in the written expert evidence in this case, one issue is highlighted: the “independence” of parties’ expert evidence. The Court had the difficulty of facing two opposing expert views that both claimed to be “independent”<sup>70</sup>. This difficulty was also expressed by judges in the interviews which will be shown later.

#### 3.4.2.3 State Responsibility Cases (excluding the use of force):

The first case to be examined is the *Barcelona Traction Case* between Belgium and Spain. Belgium was seeking for reparation for the damage allegedly

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<sup>69</sup> *Oil Platforms Case*, ICJ, 2003 para 15

<sup>70</sup> *Oil Platforms Case*, ICJ, 2003 para 59

caused by Spain to Belgian nationals who were shareholders in the Barcelona Traction Company.

This case shows that the evidence introduced to the Court can include legal expertise, and that experts can be appointed as members of the delegation. The dispute involved questions of Spanish law. Belgium used as its “Expert-Counsel” three Professors from Spanish universities. Spain also appointed as members of its delegation various inspectors and experts from its ministry of finance<sup>71</sup>.

Again, the expert evidence in this case was only in the written format. Belgium submitted an expert report on the amount of compensation owed to it. However, there were conflicting expert views on the value of the Barcelona Traction Company. The Belgian government, *inter alia*, requested as an alternative to its suggested amount of compensation owed that the Court should carry out an expert enquiry, similar to the final stage of the *Corfu Channel Case*<sup>72</sup>. However, the Court did not carry it out, but without stating its reasons.

There was extensive use of expert evidence in the *South West Africa Cases* between South Africa on one hand, and Ethiopia and Liberia on the other. The dispute concerned the duties of South Africa as the Mandatory over the other two States under a regime set up under the League of Nations.

This case illustrates that the Court is willing to use experts through extensive oral examinations: thirteen witness-experts and one expert were called. The examination took place in thirty-eight hearings and roughly two months to complete. The process involved questions put in the examination, cross-examination and re-examination on behalf of the Parties, and by Members of the Court. The experts included various professors in Social Philosophy, Social and Cultural Anthropology, Geography, Economics and the Chief Historian of the United States Army<sup>73</sup>.

A development worth noting in this case was the use of the *voir dire* for the first and only time in the Court’s history. The *voir dire* is an examination of the experts to determine his competence as an expert and his qualifications. It has its roots in the Common Law tradition and is not normally used in international tribunals where States are normally entitled to call any expert they chose. Not explicitly

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<sup>71</sup> *Barcelona Traction Case*, ICJ, 1970, 4-6

<sup>72</sup> *Barcelona Traction Case*, ICJ, 1970, 14

<sup>73</sup> *South West Africa Cases (Merits)*, ICJ, 1966, 9-10



provided for in the provisions, allowing the *voir dire* indicates that the Court is willing to be flexible on the procedural rules on expert evidence<sup>74</sup>.

The issue to be addressed by the Union of South Africa was the cause of the large number of witness-experts and amount of time spent. *Inter alia*, the Union was trying to demonstrate that the principle of non-discrimination, as relied on by the Applicant, cannot always produce beneficial results and often are detrimental for all concerned. The Union also attempted to demonstrate that the circumstances which existed in South West Africa called for a policy of differentiation and not one of attempted integration.<sup>75</sup> The experts were called from around the world to show an overwhelming weight of authority and the practice of States<sup>76</sup>.

However, after the large amount of time spent on examining the experts, the testimonies were not significant to the judgment because the Court ruled that the Applicant had no legal right or interest, and the claim was rejected as a result.

In this case, it was confirmed that the parties had a right to produce evidence by calling experts. The Court stated this in response to a proposal made by the Applicants, in an attempt to shorten the lengthy procedure, that the Court should decide that South Africa, *in lieu* of calling witnesses or experts to testify personally, should embody the evidence in depositions or written statements. The Court replied: "The Statute and Rules of Court contemplated a right in a party to produce evidence by calling witnesses and experts, and it must be left to exercise the right as it saw fit..."<sup>77</sup>

The *Nicaragua Case* is also worth mentioning in the examination of the Court's approach on expert evidence. This is because of the extraordinary circumstances that the United States did not appear before the Court at the merits phase. The Court took note of the special circumstances, and said that it must ensure equal treatment of the parties. In relation to this, the Court underlined its power to launch an enquiry or request an expert opinion according to Article 50 of the Statute. However, it noted that this would neither be practical nor desirable in the case especially if the experts or the members of the enquiry needed to go to the applicant and neighbouring States, as might have been the case. The Court stated that it had a

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<sup>74</sup> E.g. *South West Africa Cases (Merits)*, ICJ, 1966, ICJ Pleadings 341-346. See further: Sandifer, (1975) 342-343. Cf. section on ITLOS, see: Chapter 6, Section 4, 205-226

<sup>75</sup> See further: Sandifer, (1975) 340

<sup>76</sup> *South West Africa Cases (Merits)*, ICJ, 1966, 9-10

<sup>77</sup> *South West Africa Cases (Merits)*, ICJ, 1966, 9

number of documents supplied by Nicaragua and the United States before it left the proceedings, and they could aid the Court in determining the facts of the case.

The *ELSI Case*, following the *Nicaragua Case*, has illustrated that expert evidence can also cover issues such as finance, as well as domestic law. The case concerned a dispute before a Chamber of the Court between the United States and Italy regarding a company (ELSI, a company running a plant producing electronic components) in Italy, and owned by US shareholders. The company was in financial trouble. The Italian government tried to keep the company running while the owning US corporation wanted to close it down and liquidate its assets. Following a series of events, which included a requisition of the plant by an order of the Mayor of Palermo, ELSI went into bankruptcy. The question before the Court was whether Italy had breached the existing Treaty of Friendship, Commerce and Navigation between the two States.

Expert opinion on whether the US company had exhausted all local remedies was annexed to the written submissions. Differing expert opinion was also given on the financial status of the company and the legal consequence. Various experts were also called before the Chamber. There was also the questioning of the Parties and the experts by the Chamber. The replies were given orally or in writing prior to the close of the proceedings. The experts of both parties gave their opinion regarding the state of insolvency of the company. Because of the complexity of the issue, the views of the experts of the two parties differed, and so were the views of the different experts called by Italy<sup>78</sup>.

The *Gabcikovo-Nagymaros Project Case* has shown two things about expert evidence: a) experts can have a function even before the dispute is submitted to the Court, b) in some cases, the parties might prefer to have experts as members of their delegation and not call them before the Court. As for the facts of this case, it was between Hungary and Slovakia concerning a joint project of building water locks on the river Danube which also acted as a boundary between the two countries. This case was very technical and involved experts on many issues.

With regard to issues of the water locks on the Danube, prior to the case being before the Court, the parties had set up a tripartite group of experts on the measures that were to be taken at the time. The group of experts was composed of one person

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<sup>78</sup> *The ELSI Case*, ICJ, 1989, 104

designated by each party and three who were designated by the Commission of the European Communities, having offered to mediate. Experts were also used when the Treaty for the scheme was originally drafted. These expert reports were later used by the Court in understanding the dispute. For example, prior to the proceedings, experts became aware of the ecological effects of the system of locks on the river.

In addition, no experts were called by either party before the Court, but they were appointed as members of the delegation<sup>79</sup>. For example, Hungary appointed as “Advocates” a number of experts: a professor of hydrology, a professor of biology, and a consulting engineer. Slovakia also appointed scientists as “Counsel and Experts”. The opinion of these experts would then be incorporated in the written submissions. This underlines the discretion that the parties have in the way in which expert evidence is presented to the Court. It also further begs the question of the extent to which expert evidence can avoid being scrutinized by the other party, because if not expert is called to give an oral testimony, then there would be no cross-examination.

#### 3.4.2.4 Delimitation, boundary and fisheries area

The delimitation of boundaries is always a technical issue and need expert advice, at least from cartographers or, in cases of maritime delimitation, hydrographers. This section will examine how expert evidence has been presented in such cases.

##### 3.4.2.4.1 *The Temple Case*:

*The Temple Case* was a dispute between Thailand and Cambodia concerning which State’s territory the Temple Preah Vihear lied. Both Parties used surveyor experts as part of their delegation. Cambodia appointed an Expert Advisor from the Royal Khmer Armed Forces while Thailand appointed members of the Royal Thai Survey Department.

Oral evidence was presented to the Court. Thailand called experts from Delft including: aerial surveyors and a geomorphologist. Cambodia only called a witness.

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<sup>79</sup> *Gabcikovo-Nagymaros Project Case*, ICJ, 1997, 9-11

The hearing of the experts and witness took five days, with examination and cross-examination from the parties, and questions from the Court.

It is of note that various Members of the Court remarked on the quality of the expert evidence presented by Thailand. Judge Fitzmaurice noted that the evidence produced was “honest and reliable”<sup>80</sup>. Judge Quintana stated: “In general, the opinions of the experts...for Thailand impressed by their technical precision and the logical nature of their reasoning. Moreover, the official character of the Center, which is connected with the Netherlands Government, confers upon its opinion objectivity and an authority perhaps greater than could attach to the work of a private firm.”<sup>81</sup> This suggests that the Court would give more weight to expert evidence from an “impartial” source. In addition, Judge Koo, referring to the practice in the *Corfu Channel Case*, made a point in his Dissenting Opinion that, considering the complex and technical issues in the case, the Court might have benefited from appointing its own experts under Article 44 and 50 of the Statute<sup>82</sup>. This again perhaps underlines the preference of the Court for “independent” expert evidence rather than that introduced by the parties.

Judge Quintana further highlighted the importance of expert evidence, especially that which had been obtained on location: “it was Mr. Ackermann’s special merit that he carried out the work of frontier reconnaissance...This Court has also, in its Judgment in the *Corfu Channel Case*, stressed the value of an expert investigation...The Judgment said: “The Court cannot fail to give great weight to the opinion of the Experts who examined the locality in a manner giving every guarantee of correct and impartial information’ (I.C.J. Reports 1949, p. 21).”<sup>83</sup>

#### 3.4.2.4.2 *Continental Shelf (Tunisia v. Libya)*:

This case also involved the use of many experts. It must be noted that there were two stages to this case. The Court reached its judgment on the initial application in 1982. However, Tunisia later applied for a revision and interpretation of the 1982 judgment.

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<sup>80</sup> *Temple Case*, ICJ, 1962, 60

<sup>81</sup> *Temple Case*, ICJ, 1962, 73

<sup>82</sup> *Temple Case*, ICJ, 1962, 100

<sup>83</sup> *Temple Case*, ICJ, 1962, 73

In the first application to the Court, a range of experts were used by the two States including geologists, oceanographers, and engineers. Their expert opinion on the character of the sea-bed in question was incorporated in the submission of the Parties. In addition to the written submission, the Professor of Geology at the Technical University of Munich was also called by Libya to give an oral testimony pursuant to Articles 57 and 63 to 65 of the Rules of Court, and examined and cross-examined by both Parties.

What is further of note in this case is that experts were also used to implement the judgment of the Court. The Special Agreement only requested the Court to specify the way as to enable the experts of the two countries to delimit the area without difficulty<sup>84</sup> and the precise delimitation line was for the experts to determine. Consequently, the Court left the exact coordinates of the A part of the most westerly point of the Tunisia coastline between Ras Kaboudia and Ras Ajdir to the experts. They were to use the cartographic evidence that were available and carry any *ad hoc* survey *in loco* if necessary.

The subsequent application for revision by Tunisia concerned, *inter alia*, the technical question of the determination of the latitude at which the bearing of the delimitation line is to change direction. The delimitation line had previously been divided into two segments with a point where the bearing of the line would change.

However, at this revision stage, the Court refused to appoint experts as submitted by Tunisia that “there is a cause to order an expert survey for the purpose of ascertaining the exact co-ordinates of the most westerly point of the Gulf of Gabes”<sup>85</sup>. The Court reaffirmed its power under Article 50 of the Statute at any time to launch an enquiry or obtain an expert opinion. “However, this provision must be read in relation to the terms in which jurisdiction is conferred upon the Court in a specific case; the purpose of the expert opinion must be to assist the Court in giving judgment upon the issues submitted to it for decision. In the present case, therefore, it would be appropriate to accede to the request of Tunisia only if the determination of the exact co-ordinates of the most westerly point of the Gulf of Gabes were required to enable the Court to give judgment on the matters submitted to it.”<sup>86</sup> The Court noted that its previous judgment has left the precise co-ordinates of this most westerly point of the

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<sup>84</sup> Article I of the Special Agreement, *Tunisia/Libyan Arab Jamahiriya*, ICJ, 1982, 21

<sup>85</sup> *Application for Revision and Interpretation of the Judgment of February 24, 1982*, ICJ, 1985 para 64-65

<sup>86</sup> *Application for Revision and Interpretation of the Judgment of February 24, 1982*, ICJ, 1985 para 65

Gulf of Gabes for the experts to determine<sup>87</sup>. The Court further added that its decision was covered by the force of *res judicata* and it would appoint a panel of experts only if there was a joint request from the parties. Unfortunately, the Court did not enunciate further in what circumstances it would in the future give effect to a request submitted by one party only. The Court stated that this question “does not fall to be considered at the present time.”<sup>88</sup>

#### 3.4.2.4.3. Other cases:

The *Gulf of Maine Case* of 1984, between the United States and Canada, concerning the maritime delimitation of the Gulf was before the Chamber of the Court. The Parties requested the Chamber to appoint a technical expert nominated jointly by the Parties to assist it in respect of technical matters and, in particular, in preparing the description of the maritime boundary and the charts. According to the Special Agreement, the expert is to be present at the oral proceedings and available to the Chamber for any questions that might arise.<sup>89</sup> The Special Agreement also set up a framework of technical provisions the expert was requested to utilize, such the types of maps and lines to be used<sup>90</sup>. The expert had to make a solemn declaration, and his explanatory Report was annexed to the judgment.<sup>91</sup>

Canada and the United States also appointed experts as members of their delegation including oceanographers and experts on fisheries. The Parties submitted expert opinion as part of their pleadings. For example, Canada had as part of its submission expert evidence on the nature of Georges Bank<sup>92</sup>, and the United States submitted expert evidence on the fish resource distribution and ecosystem of the region. Further, one expert from the National Oceanographic and Atmospheric Administration was called by the United States, and he was subject to questions from both parties.

In addition to the written expert evidence, there was again the use of oral testimony in the *Continental Shelf (Libya v. Malta) Case*<sup>93</sup>. Libya called three experts and Malta called two. In the usual manner, the experts were examined and cross-

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<sup>87</sup> *Application for Revision and Interpretation of the Judgment of February 24, 1982*, ICJ, 1985 para 65

<sup>88</sup> *Application for Revision and Interpretation of the Judgment of February 24, 1982*, ICJ, 1985 para 67

<sup>89</sup> Special Agreement Article II, *Gulf of Maine Case*, ICJ, 1984, 253

<sup>90</sup> Article IV of the Special Agreement, *Gulf of Maine Case*, ICJ, 1984, 254

<sup>91</sup> *Gulf of Maine Case*, ICJ, 1984, 344

<sup>92</sup> *Gulf of Maine Case*, ICJ, 1984, 276

<sup>93</sup> *Libyan Arab Jamahiriya V. Malta*, ICJ, 1985 para 38

examined. In addition, the Court also appointed its own expert cartographer who gave an opinion on the delimitation line that would divide the difference in area between the claims of the two parties into two equal halves. Again, similar to the *Continental Shelf (Tunisia v. Libya) Case*, the Special Agreement only requested the Court to determine the applicable principles and rules of international law. The Court therefore did not draw the exact delimitation line but left open to the experts of the parties to determine the exact point at which the delimitation line will intersect 15° 10' E meridian. In other words, the final solution of the dispute was left to experts.

Following this case came a series of cases on delimitation. In all of them, experts would be appointed as members of the delegation. They included: engineers<sup>94</sup>, hydrographers<sup>95</sup>, cartographers<sup>96</sup>, and lawyers<sup>97</sup>. The inclusion of expert evidence in written submissions would be the norm. In the *Frontier Dispute (Burkina Faso/Republic of Mali) Case*, the parties requested the Court to appoint three experts for the purposes of aiding them in the demarcation process. The Court noted that such an appointment would not come within the meaning of Article 50 of the Statute. Consequently, instead of appointing the experts in the judgment, the Court did so in a separate Order<sup>98</sup>. In the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) Case*, without an objection from Honduras, El Salvador suggested that the Chamber consider the possibility of obtaining evidence *in situ* according to Article 6 of the Rules, and requested an inquiry or expert opinion according to Article 67 of the Rules. However, the Chamber decided that neither was necessary but did not enunciate why or state under what circumstance it would be appropriate<sup>99</sup>.

What must also be noted is that, in the *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal) Case*, Guinea-Bissau requested the Court to allow the calling as a witness or expert witness of a person already included as an adviser in the list of those representing the State. Senegal, on the basis of *inter alia* Article 57 of the Rules of Court, objected. The Court decided that it would not be appropriate to accede to the request of Guinea-Bissau. This shows that the Court draws a clear line

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<sup>94</sup> *Burkina Faso V. Republic of Mali*, ICJ, 1986

<sup>95</sup> *Greenland and Jan Mayen Case*, ICJ, 1993

<sup>96</sup> *Libya v. Chad*, ICJ, 1994

<sup>97</sup> *Qatar v Bahrain*, ICJ, 2001

<sup>98</sup> See further: *Burkina Faso V. Republic of Mali*, ICJ, 1986 Order of 9 April 1987

<sup>99</sup> *El Salvador V. Honduras*, ICJ, 1992, 400

between experts who are members of the delegation, and the “independent” experts called to testify.

In the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain) Case*, for the first time, expert evidence was submitted on the question of the authenticity of documents. Bahrain had challenged Qatar’s documents annexed to the pleadings. However, the Court at the end decided to disregard the disputed documents for the purposes of the case<sup>100</sup>. Expert reports were also used by the parties on other issues such as whether Qit’at Jaradah was an island or a low tide elevation. The Court ruled in Bahrain’s favour that it was an island for the purpose of drawing an equidistant line partly because the experts of Qatar did not prove that it was a low-tide elevation.

In the *Case Concerning Kasikili/Sedudu Island*, involving the question of the boundary between Botswana and Namibia around Kasikili/Sedudu Island and the legal status of the island, the Court highlighted the problem that the expert evidence submitted by the parties was often contradictory<sup>101</sup>. The evidence in this case concerned the Chobe River, used for the purposes of determining the boundary. With the limited knowledge of the Court on technical issues, it was very difficult for it to reconcile the difference in expert opinion. Judge Oda suggested that the Court should have appointed its own experts because the answer depended largely on scientific knowledge<sup>102</sup>.

### 3.5 Interviews with the Judges:

The interviews with the judges have been revealing on the approach of the Court on expert evidence. First, Judge A has stated that the Court has no general policy on the way in which expert evidence is admitted. Judge A and Judge B noted that written submissions are generally of high quality. They can cover a wide range of issues<sup>103</sup>, but not subject to cross-examination.

Judge A and B underlined the right of the parties to present oral evidence, which they have exercised on occasion. However, both judges added that in certain

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<sup>100</sup> *Qatar v Bahrain*, ICJ, 2001, 47

<sup>101</sup> *Case Concerning Kasikili/Sedudu Island*, ICJ, 1999 para 28

<sup>102</sup> *Case Concerning Kasikili/Sedudu Island*, ICJ, 1999 Separate Opinion of Judge Oda, para 32

<sup>103</sup> Judge C



cases, the quality of the oral evidence has not been high, and the process does not add much to the information already submitted through the written submissions.

Experts can also be appointed as members of the delegation. As explained by Judge B, these experts would take the Court through the technicalities of the dispute. They are not examined like the experts called before the Court. However, they must face the contrary arguments of the other party. The use of delegation experts is becoming a wide and growing practice. Judge B added that expert evidence presented in this format is very time-saving. The information is clear and there is much less courtroom tactics involved.

Regarding the use of independent experts by the Court, Judge C stated that this would normally be requested by the parties. Judge B noted that, because it is hard for an expert to be separated from his views, the Court has been cautious as it does not want to be seen as pre-judging the issues by selecting particular experts. For this reason, a commission of experts of 3-5 people would be more feasible if independent experts are appointed in the future. He further added that he is skeptical of the use of independent experts because, in his opinion, there are also many honest points of views from delegation experts. Judge C has added that the reason for refusals to parties' requests for independent experts depends on the case at hand.

As for the future of the approach of the Court on expert evidence, Judge A has expressed his view that Court-appointed independent experts could be put to good use, but this still depends on the nature of the case. There will be a greater readiness to call on independent experts<sup>104</sup>. There were suggestions about using affidavits. However, this was not liked by many members of the Court because it was seen to be too Anglo-Saxon. Judge A said that he is a believer in the division of labour. Consequently, the Court should try to use independent experts as often as it can. Judge C underlined that independent experts can be used in future cases if there is a direct clash in the evidence presented by the parties. In such cases, an objective view would be beneficial. However, Judge C has indicated that the parties are left to conduct the proceedings. The Court will generally remain passive. It could be dangerous for the Court to start actively seeking information on its own accord. For example, Judge C asked the question whether France and Australia would have been happy if the Court started to seek information in the *Nuclear Test Case*.

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<sup>104</sup> There is the possibility of using independent experts in the *The Pulp Mills Case*, ICJ, 2006

### 3.6 Concluding Remarks:

Many forms of expert evidence have been used before the Court covering a very wide range of issues<sup>105</sup>. Expert evidence was often used in delimitation cases on technical issues such as cartography and hydrography. In State responsibility cases, expert evidence submitted covered, *inter alia*, questions of domestic law<sup>106</sup> and environmental issues<sup>107</sup>. In use of force cases, expert evidence was used on issues such as military equipment and their capabilities<sup>108</sup>. Further, from the *Corfu Channel Case*, the Court has stated that the scope of the opinions of the experts is limited to the questions submitted. This is an indication that the Court wants to retain as much as possible its judicial function, and reduce the unnecessary effects that the expert evidence might have on it.

The expert evidence has also been presented to the Court through various channels, the most frequent way being the written submission of the Parties. The Parties would obtain the evidence from their own delegation experts or those who they have specifically commissioned. Although less frequently used than written submissions, Parties have also called experts before the Court. The experts would be subject to examination and cross-examination from Counsel of both Parties and also questions from the Court. Because of the nature of these submissions, the Court often found itself in the difficult situation facing contradicting evidence from the Parties. The channel least used by the Court to admit expert evidence was appointing its own experts according to Article 50 of the Statute. It would normally be up to the parties to request this. The Court has appointed such experts on several occasions: e.g. the *Corfu Channel Case* and the *Gulf of Maine Case*. Apart from this being agreed upon by the parties, the Court has never enunciated as to the criteria applied on whether it would appoint its own experts. In some cases, the Court has given reason for the rejection<sup>109</sup>; other times, no reason was given<sup>110</sup>.

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<sup>105</sup> See further: Rosenne, (1997) 1164

<sup>106</sup> *Barcelona Traction Case*, ICJ, 1970

<sup>107</sup> *Gabcikovo-Nagymaros Project Case*, ICJ, 1997

<sup>108</sup> *Oil Platforms Case*, ICJ, 2003

<sup>109</sup> As mentioned in this chapter, 192-193: *The Nicaragua Case*, ICJ, 1986

<sup>110</sup> As mentioned in this chapter, 198: *El Salvador V. Honduras*, ICJ, 1992

As well as experts used by the Court to reach its judgment, it is also worth noting that experts can also be used for the purposes of implementing the decision of the Court<sup>111</sup>.

This section will also begin to address the question of what factors play a role in determining the approach of the Court on expert evidence. The details of the study will be left to the thesis's concluding chapter where all tribunals and all aspects of evidence will be looked at together.

The first factor that seems to have an influence over the Court's rules on experts is domestic rules. Even though the practice of the Court does not indicate that it was following a particular jurisdiction's approach on experts, there are some influences to be seen. The way in which the Court conducts its oral proceedings seems to have been inspired by the Common Law tradition.

The second factor is the deference granted by the Court to States. This was suggested by Judge C when he said that the parties are normally left to conduct the proceedings with the Court being passive and cautious about seeking its own information through its own experts. This perhaps reflects the level of autonomy the Court is willing to grant to the parties.

The third important influencing factor for the Court is the quality of the expert evidence through the different channels. The judges have said that, in some cases, the quality of the evidence during the oral proceedings have not been high. Despite the right of the parties to present oral evidence, the bench might discourage this in the future. In some cases where there is a direct clash between the evidence of the parties, the Court might seek a more objective view through its own appointed experts.

As indicated by Judge B, a fourth factor that could influence the approach of the Court is fact that it is trying to be seen to the largest extent possible as an impartial body. The judge suggested that independent experts are not appointed by the Court because it does not want to be seen as prejudging the dispute.

Other influencing factors could include: a) limited time especially in urgent cases or to avoid a backlog of cases, b) limited financial resources because the Court must provide funding if it appoints its own experts, c) the history and background of

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<sup>111</sup> E.g. As mentioned in this chapter, 198: *Burkina Faso V. Republic of Mali*, ICJ, 1986

the ICJ, and its relationship with the PCIJ. These issues will be further explored in the concluding chapter.

## Section 4: ITLOS:

### 4.1 Introduction:

At the outset, it is worth noting three things about ITLOS. First, the type of cases it handles includes prompt release cases, provisional measures cases, and merits cases. Second, compared to other tribunals, there have been a limited number of cases before ITLOS which restricts the study of the section. Third, there is not much existing literature on the Tribunal's approach on evidential rules. This section will be breaking new ground.

### 4.2 Provisions of ITLOS:

The provisions of the Tribunal include five instruments: Part XV of UNCLOS, the Statute of the Tribunal, the Rules of the Tribunal, the Guidelines concerning the Presentation of Cases before the Tribunal, and the Resolution on the Internal Judicial Practice of the Tribunal.

The comparable wording indicates that the provisions of ITLOS have been based on those of the ICJ<sup>112</sup>. Similar to the ICJ, the emphasis has been on flexibility and the admission of as much expert evidence as possible. There are many channels through which expert evidence can be brought into the proceedings and also provisions to ensure the quality of the expert evidence.

First, the Tribunal may appoint its own experts. According to Article 289 of UNCLOS, the Tribunal may do this for disputes involving scientific or technical matters, at the request of a party or *proprio motu*, but no fewer than two experts may be selected<sup>113</sup>. Apart from exceptional cases, the party's request for the appointment of experts must not be later than the closure of the written proceedings<sup>114</sup>. The Tribunal is to select the experts upon the proposal of the President who is to consult the parties beforehand<sup>115</sup>. Further, the experts are preferably to be chosen from a list maintained by international organizations according to Article 2, Annex VIII of

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<sup>112</sup> See: Chapter 6, Section 3.4.1, 186

<sup>113</sup> UNCLOS, 1982 art 289; Rules of ITLOS, 2001 art 15

<sup>114</sup> Rules of ITLOS, 2001 art 15(1)

<sup>115</sup> Rules of ITLOS, 2001 art 15(2)

UNCLOS.<sup>116</sup> The experts have to make a solemn declaration. Once chosen, they sit on the bench without votes and can take part in the deliberation of the Tribunal<sup>117</sup>. So far, no expert has been appointed according to Article 289 of UNCLOS.

Further, according to the Rules, the Tribunal can arrange for an inquiry or expert opinion after hearing the parties<sup>118</sup>, and it must determine the relevant details including the subject matter and the procedures to be followed. The parties have an opportunity to comment on the completed report<sup>119</sup>. In addition, the Tribunal may also arrange for the attendance of an expert to give evidence in the proceedings if necessary<sup>120</sup>. An expert can be examined otherwise than before the Tribunal at the request of a party or if the Tribunal considers it necessary. The President is responsible for taking the steps to implement such a decision<sup>121</sup>.

Second, the parties can introduce expert evidence to the Tribunal as part of the oral proceedings<sup>122</sup> but they must communicate the information regarding the evidence to be produced to the Registrar in sufficient time before the opening of the oral proceedings. This communication must contain the details of the experts the party intends to call, with indications of the points to which their evidence will be directed. A copy of the communication must also be furnished for transmission to the other party<sup>123</sup>. The judges and the parties may question the experts. Further, the parties are free to determine who to call as experts. Similar to the ICJ, if a party wishes to call an expert not included in the communication list, it can make a request to the Tribunal and inform the other party, and supply the information required by Article 72 of the Rules. The expert may be called if the other party raises no objection or, in the event of an objection, the Tribunal can authorize it after hearing the objecting party<sup>124</sup>.

The procedure for the examination of experts is similar to that of the ICJ<sup>125</sup>. The details are for the Tribunal to determine<sup>126</sup>. Experts are, under the control of the President, examined by the agents, counsel or advocates of the parties starting with the party calling the expert. Questions may be put to them by the judges. Before

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<sup>116</sup> UNCLOS, 1982 Annex VIII, art 2

<sup>117</sup> Rules of ITLOS, 2001 art 15(4) and Rules of ITLOS, 2001 art 42(2)

<sup>118</sup> Rules of ITLOS, 2001 art 82(1)

<sup>119</sup> Rules of ITLOS, 2001 art 82(2)

<sup>120</sup> Rules of ITLOS, 2001 art 77(2)

<sup>121</sup> Rules of ITLOS, 2001 art 78(2)

<sup>122</sup> Rules of ITLOS, 2001 art 78(1)

<sup>123</sup> Rules of ITLOS, 2001 art 72

<sup>124</sup> Rules of ITLOS, 2001 art 78(1)

<sup>125</sup> See: Chapter 6, Section 3, 183-205

<sup>126</sup> Rules of ITLOS, 2001 art 73(2)

testifying, experts other than those appointed under article 289 of the Convention have to remain out of court.<sup>127</sup>

Third, the parties can appoint experts as members of their delegation. These experts can incorporate their expertise into their pleadings to the Tribunal, both written and oral. This channel of introducing expert evidence is arguably the most convenient for the parties, and is used in all cases.

#### 4.3 The jurisprudence of the Tribunal:

This section will examine the jurisprudence of ITLOS, dividing it according to the types of cases: prompt release, provisional measures, and the merits.

##### 4.3.1 Prompt Release Cases:

Prompt release cases, unique to ITLOS, concern the detention of a vessel flying the flag of one State by another, and often the question of the release of the vessel and whether a reasonable bond or financial security has been posted according to Article 292 of UNCLOS. Prompt release cases generally involve experts on two issues: a) the value of the vessel being held, and b) the appropriateness of the bond requested by the capturing State. Some prompt release cases have not involved the use of experts, but more witnesses<sup>128</sup>. This section will examine a selection of cases that have used expert evidence extensively.

##### 4.3.1.1 *The “Camouco” Case*<sup>129</sup>:

The first prompt release case involving the use of experts was the *Camouco Case* in 1999. It concerned an application for the release of the *Camouco*, a Panamanian vessel, captured by France. It was allegedly unlawfully fishing in the exclusive economic zone (EEZ) of Crozet (French Southern and Antarctic Territories). Panama requested the Tribunal to order the prompt release of the vessel

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<sup>127</sup> *Rules of ITLOS*, 2001 art 80

<sup>128</sup> E.g. *The Saiga Case*, ITLOS, 1997 (prompt release)

<sup>129</sup> *The Camouco Case*, ITLOS, 2000

and to find that France had violated the provisions of UNCLOS. Panama argued that the bond demanded, at \$3,115,715, was disproportionate<sup>130</sup>.

Panama called two experts at the oral proceedings, having submitted the required information according to Article 72 of the Rules<sup>131</sup>. The first was a representative of the ship-owners of the *Camouco* who testified on its ownership and registration, and the specifications of the vessel. He also gave an estimation that the detention of the vessel amounted to damage costing \$250,000<sup>132</sup>. The second person was a maritime expert. He assessed the value of the vessel and addressed the question of the bond. The expert estimated the vessel at \$575,000<sup>133</sup>. Both experts thought that the bond demanded would correspond to the value of a new fishing vessel of this type, but not one that is ten years old<sup>134</sup>. These estimates were not challenged by the Respondent<sup>135</sup>.

*The “Camouco” Case* has *prima facie* shown a straight forward use of experts. However, it underlines the importance given to expert evidence by the Tribunal and the parties. Experts were called even with the urgency of prompt release cases<sup>136</sup>. It is also evident that much weight was given to the expert evidence. From the French initial demand for a bond of \$3,115,715, the Tribunal established that, taking into account the circumstances, a reasonable bond would be approximately \$1,200,000. Although not exactly the estimate by the experts, it is much closer to it than to the original demand. There were no dissenting views on the value of the vessel.

It is worth noting that, in determining the reasonable value of the bond, the Tribunal cited the *M/V Saiga Case* that “reasonableness” encompasses the amount, the nature and the form of the bond or financial security<sup>137</sup>. Further, the Tribunal considered: a) the gravity of the alleged offences, b) the penalties imposed or imposable under the laws of the detaining State, c) the value of the vessel and of the cargo, d) the amount of the bond imposed by the detaining State and its form<sup>138</sup>.

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<sup>130</sup> *The Camouco Case*, ITLOS, 2000 Judgment, para 23

<sup>131</sup> *The Camouco Case*, ITLOS, 2000 Judgment, para 18

<sup>132</sup> Although called an “expert”, his testimony could also be classified as that of a witness. However, he also addressed technical questions: e.g. the cost of toothfish. See further: *The Camouco Case*, ITLOS, 2000 Oral Proceedings 27/01/00 am pp13-18

<sup>133</sup> *The Camouco Case*, ITLOS, 2000 Oral Proceedings 27/01/00 am, 18-20

<sup>134</sup> *The Camouco Case*, ITLOS, 2000 Oral Proceedings, 27/01/00 am, 20

<sup>135</sup> *The Camouco Case*, ITLOS, 2000 para 69

<sup>136</sup> The representative of the ship-owners was both examined and cross-examined. The Defendant did not use the opportunity to cross-examine the second expert. The Tribunal did not put its own questions to the experts. See generally: *The Camouco Case*, ITLOS, 2000 Oral Proceedings 27/01/00-am

<sup>137</sup> *The Camouco Case*, ITLOS, 2000 para 66

<sup>138</sup> *The Camouco Case*, ITLOS, 2000 para 67



#### 4.3.1.2 *The “Monte Confurco” Case*<sup>139</sup>:

*The “Monte Confurco” Case*, between France and the Seychelles, concerned the vessel *Monte Confurco* captured by a French surveillance frigate in the EEZ of the Kergeulen Islands for allegedly illegally fishing in its waters. After the *Monte Confurco* was intercepted, the district court of Saint-Denis requested a posting of a bond of 56,400,000 French Francs (around \$9,700,000).

Both parties called experts to give an oral testimony according to Article 72 of the Rules and submitted information accordingly. Similar to the previous case, they were asked to evaluate the value of the vessel and also whether it was possible to fish in the area claimed by the Master of the vessel.

On the first question, the Applicant relied on reports of two experts who valued the vessel between \$400,000 and \$500,000. Oral expert testimony (from a merchant navy captain and marine surveyor) was then offered by the Applicant stating that that vessel had a value of around \$345,000, a figure based on the amount the vessel was sold for in 1999<sup>140</sup>.

On the second question, France called an expert from the Museum of Natural History, Paris. He addressed the question of whether it was possible to fish in the area claimed by the Master of the *Monte Confurco*. The expert reached the conclusion that this was not possible for the variety of fish in question due to the depth of the water of the area which would mean that the *Monte Confurco* must have been illegally fishing in the shallower waters of the EEZ<sup>141</sup>. The Applicants argued that this conclusion was based on research conducted on board a scientific vessel or French fishing vessel which were principally trawlers with a fishing capacity limited to 1000 metres. Alternatively, a different type of long-line technology was used limiting the fishing capacity to 1500 metres. However, Spanish vessels (i.e. the *Monte Confurco*) are able to fish toothfish up to a depth of 2,500 to 2,700 metres<sup>142</sup>.

The Tribunal found that the bond set at 56,400,000 French Francs was unreasonable, and accepted as reasonable the estimate of the expert called by the Applicant. This shows that expert evidence does have an influence on the outcome of

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<sup>139</sup> *The Monte Confurco Case*, ITLOS, 2000

<sup>140</sup> See generally: *The Monte Confurco Case*, ITLOS, 2000; more specifically on the testimony of the Mr. Perez *The Monte Confurco Case*, ITLOS, 2000 Oral Proceedings 08/12/00-am, 6-10

<sup>141</sup> The expert was examined and cross-examined. See further: *The Monte Confurco Case*, ITLOS, 2000 Oral Proceedings 07/10/00-pm, 7-11

<sup>142</sup> *The Monte Confurco Case*, ITLOS, 2000 Judgment, para 54-55 and Oral Proceedings 8/12/00-am, 14-21

the dispute. Further, the Tribunal ordered for the prompt release of the vessel on the furnishing of the security of 18,000,000 French Francs divided into: a) 9,000,000 for the value of the fish onboard the vessel, b) 9,000,000 for the value of the vessel itself<sup>143</sup>.

The Tribunal did not directly deal with the question of whether the vessel was illegally fishing in the EEZ of the Kerguelen Islands. This was not submitted by the parties for the Tribunal to address<sup>144</sup>. Questions of this nature are normally dealt with at the merits stage. However, because the value of the goods onboard a vessel is important in terms of estimating its value, the Tribunal did take the expert evidence on this issue into consideration. The Tribunal stated that the assumption made by the court at Saint-Paul that the catch onboard was entirely or principally caught in the EEZ of the Kerguelen Islands did not have adequate basis based upon the information before the Tribunal<sup>145</sup>. However, the use of expert evidence in this regard sparked off dissenting opinions that the Tribunal has to an extent ruled on the question whether the vessel was illegally fishing in the area<sup>146</sup>.

Apart from showing the way experts are used, what this case also illustrates is the limitation which prompt release cases have on the extent to which expert evidence can be used by the Tribunal. Consequently, this also means that this research could have benefited more from a deeper analysis if the cases were at their merits stage.

#### 4.3.1.3 *The “Grand Prince” Case*<sup>147</sup>:

The facts of *the “Grand Prince” Case* were very similar to *the “Monte Confurco” Case*. The dispute concerned the alleged illegal fishing in the EEZ of the Kerguelen Islands. A vessel flying the flag of Belize was arrested by the French authorities. Proceedings were later brought against France by Belize for the prompt release of the vessel under Article 292 of UNCLOS. The Tribunal was requested to declare the bond demanded by France to be unreasonable.

However, the Tribunal ruled that it did not have jurisdiction over the dispute under Article 292 of UNCLOS because “documentary evidence submitted by the

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<sup>143</sup> *The Monte Confurco Case*, ITLOS, 2000 Judgment, para 92-95; There were no dissenting opinions on the issue of the value of the vessel.

<sup>144</sup> *The Monte Confurco Case*, ITLOS, 2000 Judgment, para 25-26.

<sup>145</sup> *The Monte Confurco Case*, ITLOS, 2000 Judgment, para 88

<sup>146</sup> See: (a) Anderson, Dissenting Opinion p 3, (b) Jesus, Dissenting Opinion, para 26, c) Mensah, Dissenting Opinion, 1

<sup>147</sup> *The Grand Prince Case*, ITLOS, 2001

Applicant fails to establish that Belize was the flag State of the vessel when the Application was made”<sup>148</sup>. Although the Tribunal had no jurisdiction, expert evidence was still used.

After notifying the Registrar of the information required by Article 72 of the Rules, Belize called two experts: one naval engineer and marine surveyor, and one merchant navy captain and marine surveyor. The experts were examined and cross-examined on the value of the vessel, the way which they arrived at their conclusion, and also their background<sup>149</sup>. However, the experts were not questioned on the key issue in this case: the registration history of the vessel. Since this case turned on the registration of the vessel, the role of the expert evidence was limited in the outcome of the case.

#### 4.3.1.4 Other Prompt Release cases:

Prior to the cases above, the case for the prompt release of the M/V Saiga did not involve the calling of any experts, not even for the valuation of the vessel. The respondent did not request for the deposition of any bond which meant that the question of its reasonableness did not arise. The question was left to the Tribunal and a bond was set at \$400,000, in addition to the gasoil that had been discharged. The Tribunal emphasized that the bond must be “reasonable” and the figure was arrived through the evidence submitted to the Tribunal<sup>150</sup>.

There were other prompt release cases that also did not involve the calling of experts. The *Chaisiri Reefer 2 Case*<sup>151</sup> was removed by the parties from the docket before the case was decided. In the *Volga Case*<sup>152</sup>, there were no experts called in the proceedings but written reports submitted to the Tribunal on the value of the vessel. In the latest case before the Tribunal, the *Juno Trader Case*<sup>153</sup>, there were no experts called either. The parties left the Tribunal to determine the value of the vessel. In addition to the evidence submitted, the Tribunal used previous cases to establish what criteria were relevant in determining the reasonable bond<sup>154</sup>.

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<sup>148</sup> *The Grand Prince Case*, ITLOS, 2001 Judgment, para 93; Generally: para 62-94

<sup>149</sup> *The Grand Prince Case*, ITLOS, 2001 Judgment, para 25 and Oral Proceedings 6/4/01-am, 7-12

<sup>150</sup> *The Saiga Case*, ITLOS, 1997 Judgment, 17-18

<sup>151</sup> *The Chaisiri Reefer 2*, ITLOS, 2001

<sup>152</sup> *The Volga Case*, ITLOS, 2002

<sup>153</sup> *The Juno Trader Case*, ITLOS, 2004

<sup>154</sup> *The Juno Trader Case*, ITLOS, 2004 Judgment, para 81-102

#### 4.3.2 Provisional Measures Cases:

ITLOS has the authority to order provisional measures to “preserve the respective rights of the parties to a dispute or to prevent serious harm to the marine environment”<sup>155</sup>. These cases can involve a wide range of technical issues.

##### 4.3.2.1 *Southern Bluefin Tuna Case*<sup>156</sup>:

This dispute, between Australia and New Zealand on one hand and Japan on the other, concerned the experimental fishing programme of Southern Bluefin Tuna carried out by Japan. The applicants argued that Japan, through its unilateral programme in 1998 and 1999, threatened to cause serious and irreversible damage to the Southern Bluefin Tuna population. Only the question of the provisional measure was before the Tribunal.

The parties appointed experts as members of their delegation. Australia had as their advisers: (a) two members of the Department of Agriculture, Fisheries and Forestry, (b) Principal Research Scientist from the Commonwealth Scientific and Industrial Organization. Japan had as members of their delegation: (a) members of the Fisheries Agency, Ministry of Agriculture, Forestry and Fisheries of Japan, (b) members of the National Research Institute of Far Seas Fisheries, (c) Prof Butterworth, Professor at the Department of Mathematics and Applied Mathematics, University of Cape Town, (d) members of the Japan Tuna Fisheries Cooperative Associations.<sup>157</sup>

There was only one expert called pursuant to Article 72 of the Rules which was by the Applicants. He was an expert on population biology<sup>158</sup>. Japan did not call an expert but relied on evidence included as part of its written submission, prepared by a delegation expert.

The Tribunal also used expert evidence which was prepared prior to the proceedings, a report prepared by the Commission for the Conservation of Southern Bluefin Tuna as set up by the 1993 Convention for the Conservation of Southern

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<sup>155</sup> UNCLOS, 1982 art 290(1)

<sup>156</sup> *The Southern Bluefin Tuna Cases*, ITLOS, 1999

<sup>157</sup> See further, *Straits of Johor Case*, ITLOS, 2003 Oral Proceedings; New Zealand did not appoint experts of its own but used those of Australia.

<sup>158</sup> The examination of Prof. Beddington can be found at: *The Southern Bluefin Tuna Cases*, ITLOS, 1999 Oral Proceedings, 18/08/99-am, 36-45, and pm, 1-11

Bluefin Tuna between the parties. This report, involving independent scientists, was done as a peer review in addition to the view of the permanent Scientific Committee to arrive at a consensus on the joint fishing programme. The parties used the report before the Tribunal, especially on the question of the depleting Southern Bluefin Tuna stock.<sup>159</sup> Japan also annexed a document from an official of the Food and Agriculture Organization concerning the stock of the Southern Bluefin Tuna of different ages.

What is significant about the *Southern Bluefin Tuna Case* is the level of deference the Tribunal was willing to grant to the parties in allowing practices not explicitly provided for in its provisions if there is agreement between the parties.

For the first time in its history, the Tribunal allowed one of the parties to carry out a *voir dire*. The *voir dire* is a procedure associated with the Common Law tradition, particularly the United States jurisdiction. It is a preliminary examination to test the competence of a witness or expert through questions of a general nature. Proceedings in international tribunals do not usually include a *voir dire*. States are normally free to seek the advice of any expert.

The *voir dire* was requested by Japan and agreed upon by Australia and New Zealand but the specific reason for the request of the *voir dire* remain unclear. As speculation, it was Japan's strategic attempt to discredit the expert of its opponents while the Applicants obliged to the request in order not to undermine the expert's credibility. In this case, the *voir dire* concerned the employment history of Prof. Beddington, his area of work, his experience and his participation in the field<sup>160</sup>. The abnormality of the use of a *voir dire* was highlighted by the Agent of Australia and New Zealand: "this is an historical case and it has an historic event in the middle of it, because I understand that my learned friend and opponent wishes to put some questions to Professor Beddington on the *voir dire*. This is an unusual procedure in an international tribunal. States are normally entitled to seek independent advice from qualified persons..."<sup>161</sup>

What is of note is that the ICJ has also rarely allowed the *voir dire*, the only time, to the knowledge of the writer, being the *South West Africa Cases*<sup>162</sup>. However, there was no reference to the practice of the ICJ. This could indicate several things: a) a minimal level of reference and dialogue between the tribunals, b) the lack of

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<sup>159</sup> *The Southern Bluefin Tuna Cases*, ITLOS, 1999 Oral Proceedings 19/08/99-am, 18-19; Oral Proceedings, 12-31

<sup>160</sup> *The Southern Bluefin Tuna Cases*, ITLOS, 1999 Oral Proceedings 18/08/99-am, 31-45;

<sup>161</sup> *The Southern Bluefin Tuna Cases*, ITLOS, 1999, 34-35

<sup>162</sup> See further: Chapter 6, Section 3.4.2.3, 191-195

awareness of the Tribunal and Agents of cases of other tribunals, c) the limited importance which one tribunal grants to the jurisprudence of another on evidential rules.

The Agents proceeded to the examination of the expert after the *voir dire*. The expert gave his opinion on the stock of the SBT, its decline, and the appropriate catch. He was also asked to comment on the report of the expert on the Japanese delegation, Prof. Butterworth. There was then a cross-examination by Japan on, *inter alia*, his views on the peer review of the Scientific Committee which had been conducted before the dispute.<sup>163</sup>

The Tribunal also diverged from its provisions in letting the expert called by the party enter the courtroom before, and stay after, his testimony<sup>164</sup>. The parties requested the Tribunal to suspend the application of this provision for the proceedings<sup>165</sup>. This was granted by the Tribunal, although the exact reason for it is unclear, and the expert accordingly remained in court before and after his testimony. This might have been because it would be more efficient.

The two instances of divergence from the provisions indicate that the Tribunal is willing to be flexible with the consent of both parties. This again points towards the level of deference which the Tribunal has towards the parties.

What is further underlined by the case is that the parties are free to submit expert evidence in anyway they wish. This was recognized even in a statement of the Applicants. While making an argument attacking the fact that Japan did not call an expert to give an oral testimony, the Applicants also made clear that the policy of the Tribunal was of flexibility, allowing variations in different legal systems<sup>166</sup>. The Applicants highlighted the quality of impartiality of their expert, having undergone a *voir dire*.

In light of the evidence, the Tribunal ordered provisional measures to the effect that, *inter alia*: (a) the parties are to prevent aggravation or extension of the dispute, (b) the catches are to be kept to the level last agreed, (c) the parties are to refrain from conducting an experimental fishing programme except with the agreement of the other parties or unless the experimental catch is counted against its annual national allocation. There were no dissenting opinions regarding the way

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<sup>163</sup> *The Southern Bluefin Tuna Cases*, ITLOS, 1999 Oral Proceedings, 18/9/99-am, 41-45, and 18/9/99-pm, 6-11

<sup>164</sup> Contrary to *Rules of ITLOS*, 2001, article 80

<sup>165</sup> *The Southern Bluefin Tuna Cases*, ITLOS, 1999 Oral Proceedings, 18/8/99-am, 9-10

<sup>166</sup> For the argument of the applicants, see: *The Southern Bluefin Tuna Cases*, ITLOS, 1999 Oral Proceedings, 20/8/99-am, 10-11

expert evidence was used in this case. Further, from the interviews, Judge E has added that expert evidence was crucial to the outcome of this case.

#### 4.3.2.2 *Mox Plant Case*<sup>167</sup>:

The *Mox Plant Case*, between the United Kingdom and the Republic of Ireland, concerned the authorization of the United Kingdom to open a new MOX (Mixed Oxide Fuel) facility in Sellafield. The Irish Government was concerned that the plant would contribute to pollution in the Irish Sea. There were also risks in the transportation of nuclear reactive material to and from the plant.

Pending the constitution of an Annex VII arbitral tribunal as provided by UNCLOS, Ireland submitted a request to ITLOS for a prescription of provisional measures according to Article 290 of UNLCOS. Ireland made a case that the UK, *inter alia*, (a) suspend the authorization of the plant (b) ensure that there is no movement of radioactive material on the waters over which Ireland has sovereignty<sup>168</sup>.

Both parties appointed experts as members of their delegation, and relied heavily on expert evidence as part of the written submissions. Experts were not called for oral testimony according to Article 72 of the Rules. Ireland's delegation included three officers from the Department of Public Enterprise and two people from the Radiological Protection Institute of Ireland. The United Kingdom's delegation included one person from the Department of Trade and Industry and two legal advisers from the Department for Environment, Food and Rural Affairs.

In addition to their own expert evidence, Ireland also relied on a report prepared by the European Parliament's Directory General for Research under the auspices of its Panel on Scientific and Technological Office Assessment on the "Possible Toxic Effects from the Nuclear Reprocessing Plants at Sellafield (UK) and Cap de la Hague (France)"<sup>169</sup>. It was prepared by ten independent experts and submitted to the European Parliament. The report stated that the nuclear reprocessing at Sellafield generated large quantities of radioactive waste and there could be a risk of unplanned release of radioactive material which would pose a threat to the Irish

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<sup>167</sup> *The MOX Plant Case*, ITLOS, 2001

<sup>168</sup> *The MOX Plant Case*, ITLOS, 2001, Request for Provisional Measures and Statement of Case of Ireland, 63

<sup>169</sup> *The MOX Plant Case*, ITLOS, 2001, 50-59

Sea. Ireland also cited a report done by the International Atomic Energy Agency on the danger of terrorists getting access to radioactive material<sup>170</sup>.

The United Kingdom did not offer expert evidence to dispute the report by the European Parliament. However, it argued that the authorization process of the plant had been thorough at both the national and European level, relying on independent experts<sup>171</sup>. The consultation of experts by the European Commission is an obligation under the Euratom Treaty (Article 37) and the group of experts used in the process included public health experts. The United Kingdom argued that the dangers from the nuclear waste to the Irish Sea had been taken into account by the Commission. Further, the Opinion of the European Commission stated that the doses of radioactive waste received by the population in other Member States would not be significant from the health point of view<sup>172</sup>. Ireland argued that the United Kingdom has an enormous amount of expertise at its disposal but it did not dispute the findings of the European Parliament because its experts were not prepared to do so.<sup>173</sup>

The Tribunal took into account the assurance given by the United Kingdom that there would be no further transport by sea of radioactive material to/from Sellafield, and that there was no urgency for the need of provisional measures in the short period pending the constitution of the Annex VII tribunal. The Tribunal ruled the parties to cooperate on the following matters: (a) the exchange of information of the consequences for the Irish Sea as a result of the plant, (b) monitoring risks and effects on the Irish Sea, (c) the prevention of the pollution of the Irish Sea<sup>174</sup>.

#### 4.3.2.3 Case concerning Land Reclamation by Singapore in and around the Straits of Johor (*Malaysia v. Singapore*)<sup>175</sup>:

This dispute between Malaysia and Singapore concerned land reclamation activities conducted by Singapore in the Strait of Johor which separates the two States. Malaysia claimed that Singapore's actions in engaging in land reclamation around Pulau Tekong and Tuas was: a) causing serious damage to the marine environment, b) prejudice to the rights of Malaysia, c) affecting the flow regime and

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<sup>170</sup> *The MOX Plant Case*, ITLOS, 2001, 89-94

<sup>171</sup> See pleadings of Lord Goldsmith *The MOX Plant Case*, ITLOS, 2001 Oral Proceedings 19/11/01-pm, 30

<sup>172</sup> *The MOX Plant Case*, ITLOS, 2001 Oral Proceedings 19/11/01-pm, 35-37

<sup>173</sup> *The MOX Plant Case*, ITLOS, 2001 Oral Proceedings 19/11/01-am, 18

<sup>174</sup> *The MOX Plant Case*, ITLOS, 2001 Order 3/12/01, 12-14

<sup>175</sup> *Straits of Johor Case*, ITLOS, 2003



sedimentation and coastal erosion. Malaysia sought to preserve its rights relating to the marine environment and coastline, and that Singapore suspend the land reclamation activities in the area<sup>176</sup>.

Various forms of expert evidence were used. Both parties had as members of the delegation many experts in a range of fields. Malaysia included experts from its own government: (a) the Department of Survey and Mapping, (b) the Department of Environment, (c) the Royal Malaysian Navy, (d) the Department of Irrigation and Drainage, and (e) the Ministry of Foreign Affairs. There were also external experts from the Universiti Kebangsaan Malaysia. Singapore's experts included members from (a) the Ministry of National Development, (b) the Ministry of Foreign Affairs, (c) Maritime Port Authority of Singapore, (d) the National Environment Agency. There were also experts from other Singapore based institutions: (a) members of the Department of Biological Sciences from Singaporean universities, (b) members of engineering and consultancy firms. One expert was from the Delft University of Technology, Netherlands<sup>177</sup>.

What is significant about this case is the way in which one delegation expert, Malaysia's Professor in Geomorphology, was examined. In addition to presenting the applicant's case to the Tribunal as a member of the delegation of Malaysia, she was also examined as an independent expert. The Professor first acted as counsel and expressed her views on the effect of Singapore's land reclamation. However, she then was cross-examined like an independent expert on her work and study of the marine environment and coast in the area as well as her relationship with the government of Malaysia<sup>178</sup>. The practice of having a delegation expert examined by the other party is rare. In this case, the decision to do so was taken by the Tribunal in consultation with the parties<sup>179</sup>. The reason for the examination of the delegation expert in this way was not apparent. As speculation, perhaps this was done at the request of Singapore to challenge the expert, and agreed by Malaysia so not to discredit its own expert. However, the examination of the delegation expert in this way goes to underline the flexible approach of the Tribunal.

In addition, there was one expert called according to Article 72 of the Rules, the Professor of Water Management at Cardiff University. He was an expert in

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<sup>176</sup> *Straits of Johor Case*, ITLOS, 2003 Order 27/08/1999, 5-9

<sup>177</sup> See further on details of experts used: *Straits of Johor Case*, ITLOS, 2003 Provisional Measures 25/09/03-am, 3-6

<sup>178</sup> *Straits of Johor Case*, ITLOS, 2003 Oral Proceedings, 25/09/03-am, 26-32

<sup>179</sup> *Straits of Johor Case*, ITLOS, 2003 Oral Proceedings, 25/09/03-am, 25

environmental impact assessment, and examined by Malaysia and cross-examined by Singapore on the consequences of the land reclamation activities and measures that ought to be taken and the time frame of the implementation<sup>180</sup>.

The Tribunal *inter alia* ruled that, with respect to the land reclamation in the sector of Tuas, Malaysia has not shown the urgency needed or that the damage would have been irreversible pending the constitution of the arbitral tribunal. With respect to the infilling work in Area D at Pulau Tekong, the Tribunal took note of Singapore's commitment not to construct a stone revetment pending the completion of a study. It further ordered the cooperation of the two States, and the setting up of a group of experts<sup>181</sup>.

It is difficult to see the extent to which the Tribunal took into account the expert evidence in this case. It was cautious in the way in which it reached its Order so as to avoid directly addressing the question of adverse effects on the coastal area, stating: "it cannot be excluded that, in the particular circumstances of this case, the land reclamation works may have adverse effects on the marine environment."<sup>182</sup>

In this particular case, experts were also used to promote the cooperation of the two parties after the Order. The Tribunal ruled that there were to be independent experts to investigate the effects of Singapore's land reclamation, and to suggest measures to be taken<sup>183</sup>.

#### 4.3.2.4 *The M/V Saiga Case (No. 2)*<sup>184</sup>:

A continuation of the prompt release case examined earlier, the dispute concerned a shooting incident on the vessel, injury to its crew and the subsequent detention of the vessel at Conakry. According to the prompt release order, Saint Vincent and the Grenadines was to post \$400,000 as security in addition to the \$1,000,000 value cargo of gasoil that had been discharged from the vessel by the Guinean authorities. Saint Vincent and the Grenadines submitted that it had posted the bank guarantee. However, Guinea did not accept the terms of the guarantee and requested that changes be made. In the meantime, Guinea proceeded to file criminal charges against the Master of the vessel resulting in a \$15,000,000 fine, to which

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<sup>180</sup> *Straits of Johor Case*, ITLOS, 2003 Oral Proceedings, 25/09/03-am, 32-38

<sup>181</sup> *Straits of Johor Case*, ITLOS, 2003 See generally: Order, 08/10/03 and more specifically, 21-23

<sup>182</sup> *Straits of Johor Case*, ITLOS, 2003 Order, 08/10/03 para 96

<sup>183</sup> *Straits of Johor Case*, ITLOS, 2003 Order, 08/10/03, 21-22

<sup>184</sup> *The Saiga Case (No. 2)*, ITLOS, 1999

Saint Vincent and the Grenadines was made civilly liable<sup>185</sup>. The request for the provisional measure sought to prevent Guinea from taking or enforcing any judicial or administrative measure against the M/V Saiga. However, during this stage of the proceedings, there were no experts used because of the lack of technical or scientific issues.

#### 4.3.3 Merits phase:

The Tribunal was also requested to deal with the merits of this case. However, there was not extensive use of expert evidence, but more from witnesses on the events surrounding the capture of the vessel by the Guinean authorities and the history of the vessel itself.

Regarding the use of experts, what is significant about this case is the application, for the first time, of a restriction on the expert evidence submitted. The communication submitted according to Article 72 of the Rules stated that Captain Bangoura was to be questioned as an expert on the laws and regulation of Guinea, the enforcement rules of Customs laws, the applicability of the laws to the Saiga, and the legal measures taken against fishing vessels. However, when examined, the subject matter was not those previously indicated in the communication. Captain Bangoura was questioned more as a witness about the facts surrounding the event rather than on the laws of Guinea.<sup>186</sup> Saint Vincent and the Grenadines objected that the line of questioning had come as a “complete surprise”<sup>187</sup>. In response, the President of the Tribunal noted that this was a very pertinent matter, and it concerned both the Tribunal and other party. If the Tribunal knew that this would be the line of questioning, then it would have been interested to know the reaction of Saint Vincent and the Grenadines<sup>188</sup>. Further, Saint Vincent and the Grenadines would have been able to prepare a response if it had known the intention of Guinea. Consequently, the evidence from Captain Bangoura was not permitted to be given because it would be contrary to the Rules of the Tribunal. What was already given on the subject uninformed to the Tribunal was struck off record. The President gave reasons for this: (a) there was insufficient notice given to the other party, and much more

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<sup>185</sup> For a detailed factual background to the case, see: *The Saiga Case (No. 2)*, ITLOS, 1999 judgment (merits), para 31-39

<sup>186</sup> *The Saiga Case (No. 2)*, ITLOS, 1999 Oral Proceedings, 12/3/99-am, 11-14

<sup>187</sup> *The Saiga Case (No. 2)*, ITLOS, 1999 Oral Proceedings, 12/3/99-am, 11

<sup>188</sup> *The Saiga Case (No. 2)*, ITLOS, 1999 Oral Proceedings, 12/3/99-am, 11

importantly, (b) it was entirely contrary to the information that was given to the Tribunal on the line of evidence to be provided by this witness<sup>189</sup>. The President emphasized that Guinea can still provide evidence on the subject that the Tribunal was originally informed.

In addition to the reasons given by the President, the exclusion of the information from Captain Bangoura was probably due to one more policy reason. The Tribunal was against the unpredictability that would have been brought into the proceedings if the testimony was allowed. In other words, because Guinea had not previously informed the Tribunal, Saint Vincent and the Grenadines were not prepared and would be at a disadvantage if the practice was allowed. For the Tribunal, the lack of input from Saint Vincent and the Grenadines would also deprive it of a more complete picture of the issues. From this, it can be deduced that, even though the Tribunal has been flexible in terms of the rules applied to the expert evidence, it is not willing to put a party at an advantage at the expense of another or make a ruling without both sides of the argument.

The second point worth noting about this case is that the parties seem to recognize that delegation experts have a separate role to those called according to Article 72 of the Rules. In this case, the magistrate who dealt with the *Saiga* in the Guinean courts was included as an expert according to Article 72 of the Rules. However, he was also part of the Guinean delegation. Consequently, it was decided by Guinea that he only should act in the capacity of a member of the delegation<sup>190</sup>, and not an expert according to Article 72. Although not exactly the same circumstances, this must be compared to the *Strait of Johor Case*<sup>191</sup>.

The Tribunal ruled that Guinea violated the right of Saint Vincent and the Grenadines in arresting the M/V *Saiga* and, as compensation, awarded the sum of \$2,123,357 with interest. The compensation was allotted for the detention of the Captain and the crew, for the gunshot injuries to the Second Officer and one other, the confiscated cargo and the damage to the vessel.<sup>192</sup>

#### 4.3.4 Preliminary conclusion of jurisprudence of ITLOS:

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<sup>189</sup> *The Saiga Case (No. 2)*, ITLOS, 1999 Oral Proceedings, 12/3/99-am, 13

<sup>190</sup> *The Saiga Case (No. 2)*, ITLOS, 1999 Oral Proceedings, 12/3/99-am, 14-15

<sup>191</sup> See: Chapter 6, Section 4.3.2.3, 217-219 Cf. the expert's name in the *Strait of Johor Case* was not included in the communication according to Article 72 of the Rules.

<sup>192</sup> For further details, see: *The Saiga Case (No. 2)*, ITLOS, 1999 Judgment, para 167-183

The jurisprudence of the Tribunal has shown that expert evidence has been used in a variety of cases. In prompt release cases, the use of experts involved the valuation of the vessel in question, and issues such as the precise location where the dispute arose. Expert evidence has taken many forms: (a) written submissions, (b) evidence pleaded by experts who were members of the delegation, (c) evidence from experts called by the parties. It can also be seen from the cases that expert evidence seems to carry weight in influencing the outcome of the dispute. The values of the vessel in the different cases were close to the expert value, if not the same<sup>193</sup>. ITLOS has yet to appoint its own experts in prompt releases cases. The reasons why will be addressed by the interviews of the judges below.

In the provisional measures cases, similar to the prompt release cases, expert evidence was also presented in various forms. The *Southern Bluefin Tuna Case* has shown the Tribunal's willingness to be flexible in allowing parties' requests on the procedures of the proceedings that differ from the provisions. The Tribunal allowed a *voir dire* to be carried out, and the expert was also able to stay in the courtroom before and after his testimony. Further, because the Order went in favour of the applicants who called an expert to give an oral testimony, could this indicate that the Tribunal has a preference for evidence from experts who appear to be more "independent" and open to scrutiny through the cross-examination process?<sup>194</sup>

#### 4.4 Interviews with the judges:

Interviews with 13 of ITLOS's judges has been revealing on the issue of expert evidence. Judge F stated that the role of experts is crucial and Judge H added that it is clear to him that the drafters of the provisions recognized the need of the Tribunal for experts.

The judges have noted that expert evidence can come in many forms, as stated previously in this section. However, most noted that normally the evidence came from the parties. Judge E explained that this is due to the nature of international litigation which is adversarial in nature. The Court would be generally passive, not

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<sup>193</sup> See: *The Camouco Case*, ITLOS, 2000, *The Monte Confurco Case*, ITLOS, 2000

<sup>194</sup> The applicants commissioned Prof. Beddington who appeared before the Tribunal. In contrast, Japan submitted a written submission by Prof. Burlington, see: *The Southern Bluefin Tuna Cases*, ITLOS, 1999 Oral Proceedings, 18/9/99-am, 41-45 and 18/9/99-pm, 6-11

seeking information on its own accord. He further added that the objectivity of the experts is ensured by the process of the cross-examination<sup>195</sup>.

In some cases before the Tribunal, Judge E said that Tribunal-appointed experts were not needed because there was already enough expertise brought by the parties. In others, there was already expertise on the bench. Alternatively, the Tribunal used experts in an informal manner<sup>196</sup>. Judge H added that the informal experts were needed because the evidence presented by the parties was often very technical. However, Judge I stated that, with the use of informal experts, from the perspective of the party, there is a danger that they do not know the extent of the influence that the experts might have on the Tribunal. There is a lack of transparency there. Finally, Judge E said that experts can also be used for a different purpose, such as after the judgment of the Tribunal in the *Strait of Johor Case*.

Judge D observed that experts have so far been used in a satisfactory way before the Tribunal. However, the cases so far have not tested the provisions. In the *Southern Bluefin Tuna Case*, few things are worth noting: a) the introduction of the *voir dire*, b) the issue of whether experts can play two roles, as counsel and an expert called before the Tribunal, c) the Tribunal originally sought independent expertise but this did not finally materialize.

Judge H added that the Tribunal is not bound by the opinion of the experts. However, they do often lead the Tribunal to a conclusion. The Tribunal has the discretion to use all or parts of the expert evidence. He added that the Tribunal has not discussed the rules on expert evidence as such. However, he does not think that the Tribunal has been hindered by the existing rules either.

Judge I noted that the current arrangement on expert evidence is satisfactory, being the only feasible arrangement when dealing with sovereign States. The international judge cannot be too active in seeking expert evidence. Judge I added that, in his opinion, sometimes the judges bow down too easily to expert evidence.

Regarding what factors have influence on the approach of the Tribunal, many judges noted that the lack of time played a very important role. This was a reason why the Tribunal did not appoint its own experts, especially because the cases that have been before the Tribunal mostly were prompt release and provisional measures cases. Judge H added that, if there had been cases on their merits, then the Tribunal

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<sup>195</sup> Judge G, Judge J, Judge I agree.

<sup>196</sup> Judge H, Judge D agree.

might have appointed its own experts. However, the priority of the Tribunal has been on the urgency of the cases. Judge G stated that the use of experts also depends on the subject of the dispute. If the issues are very technical, experts will be needed. Further, Judge I's views that the Tribunal has to be cautious in actively seeking evidence because the parties are sovereign States suggest the Tribunal's deference to them.

Regarding the future of the Tribunal on expert evidence, many judges were of the view that the Tribunal could, with the right opportunity, use independent experts. Some judges stated that they would personally give more weight to independent expert advice<sup>197</sup>, but that is not to say that the evidence presented by the parties has been biased. However, Judge G noted that, even with Tribunal-appointed experts, their independence cannot be guaranteed, but they tend to give a more balanced and complete picture of the problem. Judge J has added that it can be sometimes difficult to find the right experts. Judge I expressed his opinion that the Tribunal should try to appoint experts in consultation with the parties. This would be a very legitimate way of using experts. However, he added that any experts should still be subject to a cross-examination.

Judge H also pointed towards Article 289 of UNCLOS. He stated that if the disputes get very technical, the Tribunal would be prepared to use this article to appoint experts who would also sit on the bench. However, the Tribunal has not needed this article so far. He further noted that the approach of the WTO on experts functions well. He liked the way in which the expert evidence submitted by the parties are again analysed by the experts appointed by the panel. With the experts' help, the panel could ask the right questions. Consequently, in the context of ITLOS, if the evidence presented by the parties is completely contrary to one another, then it would be useful to have independent experts<sup>198</sup>. They will help the Tribunal focus the issues.

Judge F stated that, in order for the adequacy of the provisions to be tested, the Tribunal would need more cases on the merits.

#### 4.5 Concluding Remarks:

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<sup>197</sup> Judge D, Judge G, Judge J

<sup>198</sup> Judge F agrees.

What must be first noted is that there have been a limited number of cases before the Tribunal, the majority of which have been prompt release and provisional measures cases. The amount of expert evidence used in these cases can be limited when compared to full merits cases, consequently putting a limitation on the study.

The provisions of the Tribunal are similar to those of the ICJ. As remarked on by Judge H, the drafters recognized the importance of experts and the need for the Tribunal to consult them. There are many provisions which provide for expert evidence. The Tribunal can appoint its own experts according to Article 289 of UNCLOS. In addition, the Tribunal can also arrange for an inquiry or expert opinion. The parties can also introduce expert evidence as part of their written submission or they can call experts to give oral testimony. Experts can also be appointed as members of the parties' delegation.

The practice of ITLOS has shown that expert evidence has generally been submitted by the parties through the written and oral testimonies. The Tribunal has yet to appoint its own experts but have used independent experts in an informal manner, and sought formal independent expert advice on one occasion which did not materialize. The judges are not active in seeking their own expert evidence. Judge E has explained that this is a result of the adversarial nature of international litigation.

The jurisprudence has also shown several points worth noting. First, the Tribunal recognizes the importance of expert evidence by using it even in the urgent prompt release and provisional measures cases. The parties used their right to present oral evidence in many of the cases. Further, the importance of expert evidence was underlined by many of the judges. Second, the jurisprudence has shown that the expert evidence plays a crucial role in aiding the tribunal to reach its decision. In many of the prompt release cases, the value of the vessel arrived by the Tribunal was the same or very close the expert estimate. Third, the Tribunal has been willing to be flexible in its approach to expert evidence. For example, in the *Southern Bluefin Tuna Case*, the Tribunal allowed a *voir dire* to be carried out. In addition, contrary to the provisions, it allowed the expert to stay in the courtroom before and after his testimony. Fourth, it can be argued that, even though the Tribunal is flexible on its approach, it is not willing to grant one party an unfair advantage over another. This was illustrated in the merits phase of the *M/V Saiga Case*.

This section has also given an insight as to the influencing factors on the approach of the Tribunal on expert evidence. Many judges noted that an important



limitation on the Tribunal was the lack of time. Facing prompt release and provisional measures cases, the Tribunal did not have any time to appoint its own experts but had to rely on the expert evidence of the parties. Many of the judges also commented that, should the Tribunal have more cases on their merits in the future, then it could appoint its own experts. Further, as indicated by one of the judges, the Tribunal seems to be careful in not being too active in seeking the expert evidence. The parties are left to their own devices, which indicates the level of deference which the Tribunal has for States.

## Section 5: WTO DSB

### 5.1 Introduction:

This section will examine the approach of the WTO DSB on expert evidence. This issue is particularly pertinent in the WTO's context because of the technical nature of the disputes. The experts generally address scientific questions of whether a Member's measure has violated the WTO agreement. It is worth noting at the outset that, because facts can only be dealt with only at the panel level, there is a corresponding limitation on expert evidence. However, there can be legal expertise at the AB level. As with the other two tribunals, there are many ways in which expert evidence can be submitted. This section will accordingly be divided into: a) party appointed experts, b) tribunal appointed experts. For the purposes of a comparative study and to underline the distinction between the use of experts in the WTO DSB and the other two tribunals, this section will focus on the WTO's use of tribunal appointed experts.

### 5.2 Party appointed experts:

Similar to the other two tribunals, party appointed experts can provide evidence in various ways. First, they can be appointed as members of the delegation. They can: a) conduct reports which the parties can submit to the panel and refer to, b) present the arguments of the parties to the panel themselves, c) give advice as part of the working progress before the proceedings itself. Alternatively, they can be called before the panel to testify, and asked questions by the parties, or the panelists. If called, the experts can be subject to cross-examination from the other party. However, in the context of the WTO, the expert evidence from the parties is normally submitted in the written form.

Parties have always been able to appoint experts as members of their delegation in both the old GATT and the new WTO regime. The right to appoint experts was confirmed by the AB in the *EC-Regime for the Importation, Sale and Distribution of Bananas Case*<sup>199</sup>. In the case, Saint Lucia argued that it should be

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<sup>199</sup> *EC-Bananas*, WTO DSB, 1997 Appellate Body Report, para 5-12

allowed to rely on the use of two private legal advisers who were not full-time Saint Lucian government officers during the AB oral hearings. The AB ruled that Saint Lucia was permitted to do so. Further, the AB stated that it could find nothing in the WTO Agreement, the DSU, the AB Working Procedures, customary international law or the practice of international tribunals, that prevents a WTO Member from including whomever it chooses in its delegation during the oral hearings<sup>200</sup>. The expert advice can cover a range of issues, including: a) legal experts on WTO law<sup>201</sup>, b) scientific experts, c) economic experts.

### 5.3 Panel appointed experts:

#### 5.3.1 Provisions of the WTO DSB:

The WTO DSB is governed by three provisions: the Dispute Settlement Understanding (DSU), the Rules of conduct on rules and procedures for the settling disputes, and the Working Procedures for Appellate Review.

What is of note in the context of the WTO DSB is that the panelists are not permanent. Consequently, expertise can be introduced into the proceedings by choosing the panelists with expertise to match the dispute. Hence, from the outset, there is arguably some level of expertise already in the proceedings<sup>202</sup>. According to the DSU, the list of individuals kept by the Secretariat for the selection of panelists will contain the area of experience and expertise of each individual to help in the selection process.<sup>203</sup> In addition to the expertise of the panellists, the DSU provides other channels for the introduction of expert evidence:

##### 5.3.1.1 The DSU

#### Expert Review Group:

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<sup>200</sup> *EC-Bananas*, WTO DSB, 1997 Appellate Body Report, para 10-12. The AB also stated that this right was particularly important for developing countries, and to ensure that they are represented by qualified counsel.

<sup>201</sup> E.g. *EC-Bananas*, WTO DSB, 1997

<sup>202</sup> For example, panelists with expertise in agriculture would deal with disputes concerning this issue.

<sup>203</sup> *DSU*, 1994 art 8(4)

According to Article 13.2 of the DSU, a panel can appoint an expert review group of independent experts to prepare an advisory report<sup>204</sup>. The details of the rules governing the expert review group are set out in Appendix 4 of the DSU.

The terms of reference and working procedures of the expert review group are determined by the panel<sup>205</sup>. They must report to the panel, and only persons with professional and experience in the field in question may participate<sup>206</sup>. There are also provisions ensuring the impartiality of the expert review group<sup>207</sup>. Members of the group are also subject to the Rules of Conduct for the DSU which ensure impartiality of the experts by providing that they must declare any conflict of interest<sup>208</sup>.

For transparency, the information provided to an expert review group may be accessed by the parties unless confidential<sup>209</sup>. The expert review group must submit a draft report to the parties for comments, and take their comments into account as appropriate in the final report. The final report is only advisory for the panel<sup>210</sup>.

Further, the expert review group is able to “seek information and technical advice from any source they deem appropriate”<sup>211</sup>. This gives the expert review group the flexibility of seeking advice on issues not foreseen by the panel at the beginning of the advisory report.

#### Experts according to Article 13.1:

A WTO panel can also ask for information and technical advice from any individual or body as it considers appropriate, as long as they are within the jurisdiction of a member State and that State has been notified<sup>212</sup>. Further, the DSU states that “a Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate”<sup>213</sup>. There are no restrictions in the DSU on who the panel can choose as experts. The only limitation is the Rules of Conduct on the issue of the impartiality of experts. As will be addressed

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<sup>204</sup> DSU, 1994 art 13(2)

<sup>205</sup> DSU, 1994 Appendix 4 art 1

<sup>206</sup> DSU, 1994 Appendix art 2

<sup>207</sup> DSU, 1994 Appendix art 3. The provisions ensure citizens of parties to the dispute do not serve on the expert review group.

<sup>208</sup> *Rules of conduct*, 1996 Rule II of the Governing Principle

<sup>209</sup> DSU, 1994 Appendix art 5

<sup>210</sup> DSU, 1994 Appendix 4 art 9

<sup>211</sup> DSU, 1994 Appendix 4 art 4

<sup>212</sup> DSU, 1994 art 13(1)

<sup>213</sup> DSU, 1994 art 13(1)

below, the practice of the WTO has shown that this article has been used to obtain expert evidence from a range of sources.

#### The Secretariat:

According to the DSU, the Secretariat can also play a role in providing information to the panel that could be classified as expert evidence. The Secretariat has to assist panels “especially on the legal, historical and procedural aspects of the matters dealt with, and...providing secretarial and technical support”<sup>214</sup>. Normally, the panel would get help from a legal officer working for the legal affairs division or the rules division, and a secretary with input on technical matters of the WTO Agreement in question. For example, in cases involving the SPS Agreement, the secretary would come from the Agricultural Division<sup>215</sup>.

#### Other provisions under the general WTO Agreement:

The Rules of Conduct does not provide ways of introducing expert evidence. It addresses the issue of impartiality, the possibility of conflicting interests, and the confidentiality of actors in the dispute settlement process, including experts<sup>216</sup>. Experts must disclose any conflict of interests before participating in the dispute settlement process.

Finally, the WTO DSB is governed by the Working Procedures for Appellate Review, containing rules on the appeal process<sup>217</sup>. Since the AB only deals with questions of law and not questions of fact, there are no articles in the Working Procedures addressing expert evidence.

#### Other specific agreements:

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<sup>214</sup> DSU, 1994 art 27(1)

<sup>215</sup> Pauwelyn, (2002) 333

<sup>216</sup> Rules of conduct, 1996 See especially: Section II, IV, VI, VII, and Annex 1b which stipulate the experts which are covered by the Rules.

<sup>217</sup> Appellate Body Working Procedure, 2005

In addition to the general WTO Agreement, some of the WTO's more specific agreements also have their own provisions regarding expert evidence<sup>218</sup>. These provisions generally confirm those of the DSU, but there are also some which supplement them, including those for permanent expert bodies. Some examples of the provisions of the specific agreements are given below.

The Agreement on Subsidies and Countervailing Measures provides for a Committee on Subsidies and Countervailing Measures and Subsidiary Bodies<sup>219</sup>. This is a body composed of representatives from each of the Members. The duties of this Committee include, *inter alia*, (a) giving Members the opportunity for consultation on matters relating to the operation of the Agreement<sup>220</sup>, (b) establishing a Permanent Group of Experts (PGE) composed of five persons<sup>221</sup>.

The PGE can give advice in three ways: (a) the panel may request assistance "with regard to whether the measure in question is a prohibited subsidy"<sup>222</sup>. In such cases, the PGE has to submit a report which "shall be accepted by the panel without modification", (b) Member States may consult the PGE and ask for opinion on the nature of any subsidy proposed<sup>223</sup>, (c) the Committee may also seek an advisory opinion on the existence and the nature of any subsidy<sup>224</sup>. However, so far in the history of the WTO, no panel has made use of the PGE<sup>225</sup>.

Other agreements also provide for permanent expert bodies. In the Agreement on Customs Valuation, there are provisions for the Technical Committee on Customs Valuation which is under the auspices of the Customs Co-operation Council. According to the Agreement, the panel is able to "request the Technical Committee to carry out an examination of any question requiring technical consideration"<sup>226</sup>. Every Member of the WTO has the right to be on the Committee. In contrast to the PGE, the report of the Technical Committee is not binding upon the panel. To date, Committee has not been used by the Members.

Another type of an expert body is set up by the Textiles Agreement: the Textile Monitoring Body. This body is different to the ones already mentioned

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<sup>218</sup> E.g. Agreement on Subsidies and Countervailing Measures, the Agreement on the Application of Sanitary and Phytosanitary Measures, and the Agreement on Technical Barriers to Trade.

<sup>219</sup> *Subsidies and Countervailing Measures Agreement*, 1994 art 24.1

<sup>220</sup> *Subsidies and Countervailing Measures Agreement*, 1994 art 24.1

<sup>221</sup> *Subsidies and Countervailing Measures Agreement*, 1994 art 24.3

<sup>222</sup> *Subsidies and Countervailing Measures Agreement*, 1994 art 4.5 The experts give advice on questions of whether the measure is a prohibited subsidy, raising questions of an overlap with the role of the panelists.

<sup>223</sup> *Subsidies and Countervailing Measures Agreement*, 1994 art 24.4

<sup>224</sup> *Subsidies and Countervailing Measures Agreement*, 1994 art 24.3

<sup>225</sup> Pauwelyn has said that the reason for this is similar to why no expert review group has been used. Pauwelyn, (2002) 336-337

<sup>226</sup> *Customs Valuation Agreement*, 1994 art 19.4. The details of the Committee are set out in Annex II of the Agreement.

because it does not give advice to panels. The Agreement stipulates that the body must “examine all measures taken under this Agreement and their conformity therewith, and to take the actions specifically required of it by this Agreement”<sup>227</sup>. Further, if a bilateral consultation fails, the Body’s role comes into play. Before requesting a panel, the parties must argue their dispute before the Body. It will then make recommendations. If the dispute cannot be resolved, then it would go to the panel where the findings of the Body are not binding<sup>228</sup>.

In addition to the agreements which provide for permanent expert bodies mentioned above, there are also others which provide for the use of experts. The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) provides that “In a dispute under this Agreement involving scientific or technical issues, a panel should seek advice from experts chosen by the panel in consultation with the parties to the dispute. To this end, the panel may, when it deems it appropriate, establish an advisory technical experts group, or consult the relevant international organizations, at the request of either party to the dispute or on its own initiative.”<sup>229</sup>

The last example is the Agreement on Technical Barriers to Trade (TBT Agreement). It provides that “At the request of a party to a dispute, or at its own initiative, a panel may establish a technical expert group to assist in questions of a technical nature, requiring detailed consideration by experts.”<sup>230</sup> The Agreement continues to stipulate the way in which these experts groups are to be regulated<sup>231</sup>. Again, the rules which regulate the expert groups are identical to those in the DSU<sup>232</sup>.

The similarity between the DSU and the specific agreements on the provisions on experts underlines the fact that the same policy is carried through the many agreements of the WTO.

### 5.3.2 The practice of the WTO DSB:

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<sup>227</sup> *Textiles Agreement*, 1994 art 8. This agreement was terminated on 1 January 2005.

<sup>228</sup> However, the findings of the Body will influence the panel.

<sup>229</sup> *SPS Agreement*, 1994 art 11.2

<sup>230</sup> *TBT Agreement*, 1994 art 14.2

<sup>231</sup> *TBT Agreement*, 1994 art 14.3

<sup>232</sup> *TBT Agreement*, 1994 Annex II

This section will address the question of how the WTO DSB has applied its provisions on expert evidence, highlighting the important cases<sup>233</sup>. From the outset, it is important to take note of the following: a) the use of experts is largely limited to the panel stage because the AB only has the competence to rule on questions of law, b) similar to the ICJ and ITLOS, and WTO DSB has not adopted a restrictive approach to the admission of evidence. The parties can submit evidence as they see fit but any evidence would be accordingly given different weights by the panel.

#### 5.3.2.1 The change from the old GATT arrangement to the new WTO regime:

Under the GATT arrangement, the panel did not seek any expert advice except on one occasion: the *Thailand-Cigarette Case* where the World Health Organization was asked its opinion<sup>234</sup>. However, this has changed in the new WTO regime<sup>235</sup>. Because the practice of the WTO has been relatively much more consistent than the other two tribunals examined before, it will be clearer for this section to be divided according to the way expert evidence has been obtained.

#### 5.3.2.2 Expert review group:

No panel has made use of an expert review group but rather opted to appoint individual experts, even when an expert review group was the preferred option of the parties. This was illustrated in the *European Communities – Asbestos Case*.

In this case, the EC argued that the DSU “requires that, when consulting scientific experts, there should be an expert review group according to the terms of Appendix 4 to the Understanding”. In reply, the panel stated that “we also note that Article 13.2 provides that panels ‘may’ request in writing form an expert review group...”, hence indicating that expert review groups are only an option<sup>236</sup>. Further, the option of the expert review group has been upheld by the AB in a number of cases: (a) the *EC-Beef Hormones Case*<sup>237</sup>, (b) the *Argentina-Footwear Case*<sup>238</sup>. In the

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<sup>233</sup> Due to the great number of cases that have been before the WTO, this section cannot examine all of them.

<sup>234</sup> *Thailand - Cigarette Case*, GATT Panel, 1990, See further: Christoforou, (2000) 623-627

<sup>235</sup> For the reasons for the increase in the use of expert evidence, see: Pauwelyn, (2002) 326

<sup>236</sup> *EC - Asbestos Case*, WTO DSB, 2001 Panel Report (2000), Section D. See further also: Pauwelyn, (2002) 327-328

<sup>237</sup> *EC - Hormones Case*, WTO DSB, 1997 Appellate Body Report, para 147. “...in disputes involving scientific or technical issues, neither Article 11.2 of the SPS Agreement, nor Article 13 of the DSU prevents panels from consulting with individual experts. Rather, both the SPS Agreement and the DSU leave to the sound discretion of a panel the determination of whether the establishment of an expert review group is necessary or appropriate.” The panel decided to consult individual experts despite the common position of the parties that an expert review group was the preferred choice. See further: Christoforou, (2000) 629-631



*EC-Asbestos Case*, the AB reached this conclusion even for disputes under the TBT Agreement which had no reference to the use individual experts but only expert review groups<sup>239</sup>.

There have been explanations for this preference, as summarised here<sup>240</sup>. First, the expert review group has to produce a report according to paragraph 6 of Appendix 4 of the DSU. There is understandably a fear that this report might restrict the panel in terms of the flexibility of the gathering of its own evidence and as to how it can reach the end result. Using individual experts gives more control to the panels over the proceedings to ask the questions as they see fit. In addition, although the capacity of the expert review group is only an advisory one, it would be difficult for the panel to ignore or not adopt any common position that the group has established<sup>241</sup>. Second, an expert review group will take a long time to finish its inquiry, possibly putting the panel under pressure in the already limited time available. The writer agrees with these views. Reasons of a practical nature can influence a tribunal's approach.

It has also been suggested that the preference for individual experts may bring about disadvantages<sup>242</sup>. First, the panels could have to decide between contradictory scientific experts. Second, the panels might not be exposed to the more balanced view that an expert group review could offer<sup>243</sup>.

### 5.3.2.3 Experts according to Article 13.1 of the DSU:

Experts according to Article 13.1 have been used on many occasions in the jurisprudence of the WTO. The Article has been used by the panels to request "information and technical advice" from a range of sources: a) individual experts<sup>244</sup>,

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<sup>238</sup> *Argentina - Measures Affecting Imports of Footwear*, WTO DSB, 1997, Panel Report, para. 84 "... Article 13 of the DSU enables a panel to seek information and technical advice as it deems appropriate in a particular case, and (...) the DSU leaves to the sound discretion of a panel the determination of whether the establishment of an expert review group is necessary or appropriate"

<sup>239</sup> *EC - Asbestos Case*, WTO DSB, 2001 Panel report, para 8.10. The panel considered the DSU and the TBT Agreement as not conflicting and as complementing each other. This meant that the expert review group was an option for the panel. The panel went on to conclude that consulting individual experts was the most appropriate method.

<sup>240</sup> Pauwelyn, (2002) 328

<sup>241</sup> Pauwelyn, (2002) 328

<sup>242</sup> Pauwelyn, (2002) 329

<sup>243</sup> See further: Pauwelyn, (2002) 329.

<sup>244</sup> There have been 7 cases where the WTO DSB has requested opinion from expert individuals. They have all been at the panel stage: a) *EC - Hormones Case*, WTO DSB, 1997, b) *USA - Certain Shrimp and Shrimp Products Case*, WTO DSB, 1998, c) *Australia-Salmon*, WTO DSB, 1998, d) *Japan - Agricultural Products Case*, WTO DSB, 1999, e) *Australia-Salmon, Article 21.5 Case*, WTO DSB, 2000, f) *EC - Asbestos Case*, WTO DSB, 2001, g) *Japan-Apples*, WTO DSB, 2003

b) institutions such as international organizations<sup>245</sup>, c) Members involved in the dispute<sup>246</sup> and those which were not<sup>247</sup>.

Article 13.1 does not limit the field of expert evidence that the panel can seek. Regarding individual experts, the focus has been on questions of science<sup>248</sup>. Panels' requests to international organizations have involved questions on specialized areas, but not necessarily scientific. For example, questions have been put to: a) the IMF concerning balance-of-payments and national reserves<sup>249</sup>, b) WIPO on the interpretation of certain provisions of the Paris Convention for the Protection of Industrial Property<sup>250</sup>.

The panel also has the discretion to request advice from experts at its own initiation. This was confirmed in the *US-Shrimp/Turtle Case*<sup>251</sup>. The parties may request the panel to seek expert opinion, but the panel has the discretion to do so or not, as confirmed in the *Argentina-Footwear Case*. Argentina requested the panel to seek advice from the IMF<sup>252</sup>. The panel ruled that this was not required, and the issue was contested before the AB. It was confirmed that the panel had the discretion to refuse such a request as long as the panel has made an "objective assessment of the matter before it"<sup>253</sup>. However, the panel would normally appoint experts if there has been a request from the parties<sup>254</sup>.

The level of the discretion of the panel to appoint experts can differ between different agreements. The wording of the SPS Agreement suggests that there is a stronger obligation for the panel to appoint experts. The provisions state that the "panel should seek advice from experts chosen by the panel" should a dispute under

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<sup>245</sup> There have been 9 cases where questions of consulting international organizations were brought before the WTO DSB. The following is a list with the relevant institution and the stage of the dispute settlement process: a) *Argentina - Measures Affecting Imports of Footwear*, WTO DSB, 1997, AB-IMF; b) *India - Quantitative Restrictions Case*, WTO DSB, 1999, Panel-IMF; c) *USA - Copyright Act Case*, WTO DSB, 2000, Panel-WIPO; d) *USA - Section 211*, WTO DSB, 2001, Panel-WIPO; e) *India - Autos*, WTO DSB, 2001, Panel-IMF; f) *EC-Sardines Case*, WTO DSB, 2002, Panel and AB-CODEX; g) *EC-Trademarks/GIs*, WTO DSB, 2005, Panel-WIPO; h) *Dominican Republic - Cigarettes Case*, WTO DSB, 2005, Panel-IMF; g) *EC-Chicken Classification Case*, WTO DSB, 2005, Panel-World Customs Organization.

<sup>246</sup> The panel's request from Members tends to be information rather than technical advice. The cases include: a) *Canada-Civilian Aircraft*, WTO DSB, 1999, panel and Appellate Body; b) *Australia-Leather, Article 21.5*, WTO DSB, 2000, panel; c) *USA - Lead Bars Case*, WTO DSB, 1999, panel; d) *USA - Wheat Gluten Safeguards*, WTO DSB, 2000, panel and Appellate Body; e) *Canada-Aircraft II*, WTO DSB, 2002, panel; f) *EC-Bed Linen*, WTO DSB, 2000, Appellate Body; g) *EC - Pipe Fittings*, WTO DSB, 2003, panel; h) *USA - Subsidies on Upland Cotton Case*, WTO DSB, 2005, panel. WTO panels may draw adverse inferences if the parties fail to produce the information requested. *Canada-Civilian Aircraft*, WTO DSB, 1999, AB Report

<sup>247</sup> *Turkey-Textiles*, WTO DSB, 1999

<sup>248</sup> See further: Pauwelyn, (2002) 331-332

<sup>249</sup> *India - Quantitative Restrictions Case*, WTO DSB, 1999

<sup>250</sup> *USA - Section 211*, WTO DSB, 2001

<sup>251</sup> It has been proposed that the panel should appoint experts on its initiation more. See further: Pauwelyn, (2002) 399

<sup>252</sup> *Argentina - Footwear*, WTO DSB, 2000

<sup>253</sup> As stated in Article 11 of *DSU*, 1994

<sup>254</sup> Pauwelyn suggests that refusing the request could undermine the legitimacy of the decision. Pauwelyn, (2002) 339

the Agreement involve scientific or technical issues<sup>255</sup>. In some SPS Agreement cases, such as the *Japan-Agricultural Products Case* or the *Australia-Salmon Case*, the panel appointed the experts even before the first submissions of the parties<sup>256</sup>.

The experts are normally taken from a list provided by relevant international organizations<sup>257</sup>. The panels appoint the experts but the parties are given the opportunity to comment on the panel's choice, ranking them in order of preference, and objecting to any with reasons for doing so. However, there has also been divergence from this norm. In the *EC-Hormones Case*, the panel allowed the parties to appoint one expert each. The panel then appointed four additional experts<sup>258</sup>.

The number of experts is for the panel to decide, and depends on the nature of the case. If the dispute involves a wide range of issues, then more experts will be needed. The jurisprudence has shown that the number of experts can vary, but tend to be odd rather than even, for example: (a) three experts in the *Japan-Agricultural Products Case*, (b) four in the *EC-Asbestos Case*, (c) five in the *US-Shrimp/Turtle Case*, and (d) six in the *EC-Hormones Case*. The two limiting factors on the number of experts seem to be time and the practical limitation for the panel to have to deal with too many experts.

From the jurisprudence, the procedure for obtaining expert opinion is normally the following. The panel would draft the questions and receive comments from the parties before sending the questions to the experts. The experts will then answer the questions in writing in the field of their expertise. The parties are then given the opportunity to comment on the expert's views in writing. The experts can take part in the oral proceedings where they can: (a) be cross-examined by the parties, and (b) answer additional questions from the panel. Before finalizing the panel report, the relevant section will be sent to the experts to ensure that their views have been conveyed accurately. The verbatim record of the hearings with the experts and their answers to the questions of the panel are also published. Compared to the ICJ and ITLOS, the use of the cross-examination is much more limited in the context of the WTO<sup>259</sup>. To explain this, Pauwelyn has suggested several reasons: a) the parties' fear to upset the experts who could heavily influence the decision of the panel, b) the

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<sup>255</sup> SPS Agreement, 1994 art 11.2. These provisions could explain why experts have been appointed more for disputes under the SPS Agreement.

<sup>256</sup> See further: Pauwelyn, (2002) 340

<sup>257</sup> For example, International Office of Epizootics on an issue on animal health.

<sup>258</sup> *EC - Hormones Case*, WTO DSB, 1997 para 6.1-6.8, esp 6.7

<sup>259</sup> See further: Christoforou, (2000) 632

WTO dispute settlement process is not so confrontational but carried out in a way similar to diplomatic meetings<sup>260</sup>.

#### 5.3.2.4 Examples of Cases:

Advice from individual experts:

Disputes with expert evidence requests from individuals according to Article 13.1 of the DSU have involved “scientific and technical” questions, often issues of health or the environment<sup>261</sup>.

#### *EC-Beef Hormones:*

This dispute was two cases running in parallel, between: a) the United States and the EC, b) Canada and the EC. It concerned European Council Directives which prohibited the importation and the placing on the market of meat and meat products which had been treated by any of the six growth hormones. Three of the hormones are naturally produced by animals, and the other three are artificially created to produce similar effects<sup>262</sup>.

Both Canada and the United States claimed that the EC measures were in violation of Article 2, 3, 5 of the SPS Agreement<sup>263</sup>. In addition, Canada argued that the measures also violated Articles III and XI of GATT<sup>264</sup>. The United States also claimed the measures violated GATT Articles I and III<sup>265</sup>.

The question before the panel, *inter alia*, was whether the EC measure complied with international standards<sup>266</sup>, and if not, whether the measure was justified<sup>267</sup>. To rule whether the measure was justified under the SPS Agreement, the panel had to decide whether the measure was consistent with Article 5 of the SPS Agreement, which had two parts: a) the risk assessment or the “exercise of assessing

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<sup>260</sup> Pauwelyn, (2002) 349; there are proposals on increasing the cross-examination process.

<sup>261</sup> There were questions involving health in four out of the seven cases involving the SPS Agreement.

<sup>262</sup> *EC - Hormones Case*, WTO DSB, 1997 Panel Report, para 2

<sup>263</sup> The articles concern basic rights and obligations, harmonization and the assessment of risk.

<sup>264</sup> Concerning national treatment and general elimination of quantitative restrictions.

<sup>265</sup> Concerning the Most-Favoured Nation treatment and national treatment.

<sup>266</sup> According to article 3.1 of the SPS Agreement, see further: *EC - Hormones Case*, WTO DSB, 1997 Panel Report, para 8.74-

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<sup>267</sup> According to article 3.3 and article 5 of the SPS Agreement, see: *EC - Hormones Case*, WTO DSB, 1997 Panel Report, para 8.85-8.86

the risks against which a sanitary measure is intended to protect.”, b) the application of the “appropriate level of sanitary protection”<sup>268</sup>.

Regarding the risk assessment, the report has shown that the panel put great weight on the expert evidence<sup>269</sup>. From the advice of its experts, the panel was satisfied that the EC has met the criteria of carrying out a risk assessment<sup>270</sup>. However, the panel ruled that the risk assessment had not been taken into account by the competent EC institutions<sup>271</sup>. The panel again relied on expert opinion to reach this conclusion, stating that the scientific studies, backed up by the opinion of the panel appointed experts, have shown that the hormones for growth promotion are safe assuming that good practice is followed<sup>272</sup>. However, the EC measure has shown a level of protection which indicated that any residue level of these hormones would be considered unsafe to human health<sup>273</sup>.

Experts were also used to address the question of whether the EC treated the three natural hormones differently when used as either: a) a growth promoter, b) for therapeutic and zootechnical purposes. The question arose because the EC allowed no hormone residue for the use of the hormones as a growth promoter but unlimited amounts for the other purposes<sup>274</sup>. The panel ruled that there were no qualitative differences in the hormones used and that the two situations were comparable.

The panel chose individual experts rather than expert review groups because of the possibility of the variety of opinions, and stated that nothing in the SPS Agreement or the DSU limits its powers to make this choice<sup>275</sup>. After consultation with the parties, the panel decided to use the same experts for the two parallel cases and had a joint meeting with the scientific experts. The Panel also decided to give access to all the information submitted in one proceeding to the parties in the other.

There were six experts involved in this case<sup>276</sup>. They ranged in nationality, and work for international organizations, various technological institutions, and universities. Much different to the practice of the ICJ or ITLOS, the questions put

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<sup>268</sup> *SPS Agreement*, 1994 art 5

<sup>269</sup> According to: *SPS Agreement*, 1994 art 11.2, and *DSU*, 1994 art 13

<sup>270</sup> *EC - Hormones Case*, WTO DSB, 1997 Panel Report, para 8.111

<sup>271</sup> *EC - Hormones Case*, WTO DSB, 1997 Panel Report, para 8.116-119

<sup>272</sup> *EC - Hormones Case*, WTO DSB, 1997 Panel Report, para 8.120-127

<sup>273</sup> *EC - Hormones Case*, WTO DSB, 1997 Panel Report, para 8.139

<sup>274</sup> Having considered other elements, the panel ruled that the EC's measure were inconsistent with Article 5.5 of the SPS Agreement. *EC - Hormones Case*, WTO DSB, 1997 Panel Report, para 8.204-209. However, the Appellate Body reversed the panel's decision with regard to this point.

<sup>275</sup> *EC - Hormones Case*, WTO DSB, 1997 Panel Report, para 8.7 This was also confirmed by the Appellate Body.

<sup>276</sup> See further: *EC - Hormones Case*, WTO DSB, 1997 Panel Report, para 6.9

forward to the experts with their responses were laid out<sup>277</sup> in the Panel Report and to a level of detail not seen in the other two tribunals. The panel, in consultation with the parties, prepared the questions which were submitted to the experts individually. The experts were requested to reply in writing to the questions which they felt qualified. They had available the written submissions and the written version of the oral submissions of the parties. The experts were then invited to meet with the panel and the parties to discuss their written responses.

This case has underlined the importance of expert evidence on the decision of the panel, being used at the various stages of the decision making process.

Advice from international organizations:

*India – Quantitative Restrictions Case:*

This dispute was brought by the United States against India concerning import restrictions imposed by India with the justification of protecting its balance-of-payments situation under Article XVIII of GATT. India had been in talks with the Balance-of-payments (BOP) Committee, and established that its aim was to remove the restrictions by 1997. In 1997, India notified the BOP Committee of its quantitative restrictions which still existed<sup>278</sup> to the effect that potential importers had to obtain a license. Various Members requested consultation with India where all but the United States reached agreement. The United States claimed that the restrictions violated Articles XI:1 and XVIII:11 of the GATT<sup>279</sup>.

During the course of the proceedings, the panel decided to consult the IMF on India's balance-of-payment situation. The questions to the IMF were written, and the IMF wrote back the replies. The panel stated that the ability for it to consult the IMF arose from Article 13 of the DSU and it was able to request information on India's monetary reserves and balance-of-payment situation to help it assess the claims. The IMF was a highly relevant source of information<sup>280</sup>.

The Report showed that the information requested aided the panel in reaching its decision. For example, the panel referred to the responses of the IMF on whether

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<sup>277</sup> 35 questions altogether, see further: *EC - Hormones Case*, WTO DSB, 1997 Panel Report, para 6.1-6.240

<sup>278</sup> See further *India - Quantitative Restrictions Case*, WTO DSB, 1999 Panel Report, para 2.1-8

<sup>279</sup> The two articles concern the general elimination and the non-discrimination of quantitative restrictions.

<sup>280</sup> *India - Quantitative Restrictions Case*, WTO DSB, 1999 para 5.11-5.12

India's measures were necessary under Article XVIII:9 of the GATT<sup>281</sup>. The IMF stated that "India's level of foreign currency reserves...was adequate."<sup>282</sup> Subsequently, the panel ruled that India's measures were not necessary<sup>283</sup>. Further, on the removal of the measures, the panel referred to the advice of the IMF that it should not be immediate but rather through a phasing out period<sup>284</sup>.

#### Information from Members:

##### *Australia – Leather, Article 21.5 Case:*

This case concerned the implementation of an earlier panel report in the *Australia – Leather Case*. In that case, the panel found that certain payments made by the Australian government to Howe, a wholly-owned subsidiary of Australian Leather Upholstery Pty. Ltd., which was owned by Australian Leather Holdings, Ltd., was a prohibited subsidy under the Agreement on Subsidies and Countervailing Measures (SCM Agreement). The panel recommended that Australia withdraw the subsidy within 90 days. Subsequently, Australia required that Howe repay A\$8.065 million which was to cover any remaining inconsistent portion of grants made under the contract. However, the United States argued that the measure taken by Australia was not consistent with the SCM Agreement because Australia had only withdrawn A\$8.065 million of the A\$30 million grant and also given out a new loan.

The United States asked the panel to request Australia to produce a number of documents and information regarding the A\$8.065 million repayment and the new loan made. The United States argued that the information could have direct bearing on the proceedings at hand. The Panel sought the view of Australia on this request and it was willing to present the information should the panel decide it necessary. The panel decided that this was the case and the relevant documents were submitted<sup>285</sup>.

##### 5.3.2.5 Expert evidence before the AB:

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<sup>281</sup> Restrictions of import could be necessary to address the issue of money reserves.

<sup>282</sup> *India - Quantitative Restrictions Case*, WTO DSB, 1999 Panel Report, para 5.165

<sup>283</sup> *India - Quantitative Restrictions Case*, WTO DSB, 1999 Panel Report, para 5.184

<sup>284</sup> *India - Quantitative Restrictions Case*, WTO DSB, 1999 Panel Report, para 7.1-7

<sup>285</sup> *Australia-Leather, Article 21.5*, WTO DSB, 2000 Panel Report, para 5.5-12

The AB's ability to acquire new expert evidence is limited to questions of law. However, there are still channels for this to be done. As observed by Pauwelyn, the AB has its own secretariat apart from that of the panels'. According to Article 17.7 of the DSU, the AB is to be provided with "appropriate administrative and legal support as it requires". In practice, there are lawyers assigned, normally two, to each case before the AB<sup>286</sup>. Through this channel, the lawyers may give advice on questions regarding the Agreement in question. The parties can also introduce new legal expert evidence at the appeal stage. Further, in the *EC-Asbestos Case*, the AB has ruled that it is able to admit *amicus curiae* briefs<sup>287</sup>, which could provide legal expert evidence, as long as the relevant procedures are adhered to.

#### 5.4 Interviews with the panelists:

The interviews with the panelists have been revealing on the issue of expert evidence. First, Panelist L stated that the panel applies Article 13 of the DSU. All three panelists interviewed agreed that the panels were very open to the use of experts. Panelist M noted that the standard of the expert evidence has generally been high. The evidence gave the panel insights which it would not have had otherwise.

Panelist L noted that the experts in the WTO context are used differently to other international tribunals. The arrangement in the WTO is not Court-like. The panelist meetings resemble normal meetings. In his opinion, the informal nature of the proceedings is less intimidating for the experts. Consequently, more information could be gathered. In contrast, Panelist M does not like this informality. The experts are not interrogated as much as they could be. More interrogation could lead to more information. There needs to be a shift towards adjudication. Panelist K added that he would like more oral evidence in the future.

Panelist L and Panelist K also noted that the expert evidence can also come from the Secretariat. In most cases which only concerned trade, there was no need to appoint external experts. The Secretariat is very able to deal with trade issues and does provide help to the panels. However, there could be a need for experts in other areas such as the environment and health. Panelist K gave an example that, in cases

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<sup>286</sup> Pauwelyn, (2002) 334

<sup>287</sup> See further: Chapter 5, Section 5.3.3.2, 168. See: *EC - Asbestos Case*, WTO DSB, 2001 Appellate Body, *amicus curiae* procedures, para 3(f)



which involved anti-dumping, the section of the Secretariat on anti-dumping can help. Further, one or two of the panelists would be experts in anti-dumping.

Panelist L and Panelist K added that the panel does look at the expert evidence in party submissions. However, the panel is very cautious in assessing this evidence because they tend to show the extreme views of the scientific community. The panel also takes note that they tend to support the party's arguments. Further, Panelist K added that the panel takes into account factors such as: a) which expert wrote the submission, b) was the report written especially for this dispute. For this reason, Panelist M has stated that he personally prefers independent expert panels.

Panelist M stated that written and oral evidence have their advantages and disadvantages. Written evidence can provide more formality, and often more care is taken in drafting them. There can be more mistakes with oral evidence, but it does provide the spontaneity which written evidence does not provide.

Panelist L added that the current rules are satisfactory because it gives the panel the option to appoint experts when necessary.

As for the factors that could influence the approach of the WTO DSB, Panelist L has observed that the chairman of the panel is important. He can determine the direction of the panel. Panelist K noted that, because the panelists are not permanent, this could have an effect on the consistency in the way the provisions are applied. Further, both panelists added that the relaxed nature of the proceedings at the panel level could have an influence on the panel's approach. This is to be contrasted to the AB where the proceedings are more aggressive and adversarial.

## 5.5 Concluding Remarks:

The practice of the WTO DSB on expert evidence has been consistent. Like the other two tribunals examined, expert evidence can be submitted through many channels. Expert evidence can be submitted at both the panel level and the AB level. However, the latter is restricted to questions of law only.

The parties have the right to submit expert evidence, usually in the written form. There has been a lack of the appointment of experts by the parties for the purposes of the oral testimony. However, what is of note for the purposes of this section is the way in which panels have appointed their own experts.

The provisions of the WTO provide for the panels to appoint their own experts. The DSU states that the panel can appoint expert review groups (Article 13.2)<sup>288</sup> as well as appoint any individuals or body which it deems appropriate (Article 13.1). Further, the WTO's special agreements also have provisions providing for expert advice. Some provide for permanent expert bodies, e.g. the PGE, the report of which can be binding upon the panel. However, they have not been used.

Pursuant to Article 13.1, the panels have been willing to: a) appoint its own individual experts to address technical and scientific issues, b) consult international organizations on their area of expertise, c) requested information from Members. The experts can be used to address a very wide range of issues, as the examples of the cases above have shown. The panels have the discretion whether to appoint experts and decide on the number of experts needed. The questions are drafted by the panel and, after receiving comments from the parties, sent to the experts who normally reply in writing. After this reply, the panel and the parties can consult the experts in a meeting. However, the oral proceedings normally have very little role within the WTO DSB. It has been argued that, because of the extent that the panel is in control of the proceedings, the nature of the WTO DSB resembles the Civil Law system more than the Common Law system<sup>289</sup>.

From the interviews, what was clear was that the panels welcome expert evidence. If the dispute mainly involved issues on trade, the expert evidence would normally come from within the panel or the Secretariat. However, if the dispute hinged on scientific questions, then external experts would be used.

It is worth noting that, at the panel stage, the proceedings are not adversarial. As indicated by the panelists interviewed, they resemble more diplomatic meetings than a court-room. The panel meetings even take place in the same rooms as the meetings between States.

In addition, the interviews have indicated that the chairman can have a crucial role in determining the direction of the panel on expert evidence. The non-permanent nature of the panelists might also have an effect on the way the provisions are applied.

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<sup>288</sup> This article has never been used.

<sup>289</sup> See further: Christoforou, (2000) 632

## Section 6: Overall Conclusion:

The purpose of this section is to underline the general theme of the thesis around the questions posed: a) is there commonality to the approach of the tribunals on expert evidence? b) what are the factors influencing the approach of the tribunals? c) should there be a common set of rules on expert evidence?

### 6.1 The existence of a common approach:

From the examination of the practice of the three tribunals, it cannot be said that there is an emerging common set of rules to the extent that would suggest a developing community of tribunals. There are some similarities between the approaches of the tribunals and also some differences.

The similarity to be noted is that all three tribunals have adopted an open approach to the admission of expert evidence. The provisions of the tribunals allow for the submission of expert evidence from the parties, both written and oral. The parties before all three tribunals have all used this right to submit expert evidence, even if the form might differ before each tribunal. Further, each tribunal can launch a form of an inquiry or appoint its own experts on its own initiation.

There are also distinctions in the approaches of the three tribunals. The most evident one perhaps concerns the use of independent tribunal appointed experts. They have never been used before ITLOS and seldom used before the ICJ. However, before the WTO DSB, if the dispute concerns scientific issues such as health or the environment, the panels have not been hesitant to use its own experts.

Regarding the provisions, those of the ICJ and ITLOS resemble one another because the latter was based on the former when drafted. The provisions of these two tribunals do not go into much detail on how the experts are to be used. In contrast, the provisions of the WTO DSB go into much more detail. The role of the experts and the way they are to be regulated are spelled out. The rules have also been generally consistent throughout the various specialized agreements under the WTO framework.

Another distinction to be made between the ICJ and ITLOS on one hand, and the WTO DSB on the other, is the way in which expert evidence is presented. Before the ICJ and ITLOS, as well as written submissions from the parties, the expert evidence would often be presented through oral testimonies of experts called by the

parties. The experts would then be examined and cross-examined by the parties resembling the Common Law tradition. In contrast, the party expert evidence before the WTO DSB would be submitted in the written form. Parties would seldom call experts to give oral testimonies. If the panel decides to appoint its own experts, it would draft the questions in written form. The replies would then be given in the written form with an option for the panel and the parties to ask further questions. The proceedings in the WTO context resemble more the Civil Law tradition where the panel is in control, instead of sitting back and letting the parties present the case through the examination process.

Further, another distinction to be made is that the WTO has set up permanent expert bodies to deal with questions arising from specialized agreements. There are no permanent expert bodies before the ICJ or ITLOS. In addition, none of the expert advice given before the ICJ or ITLOS is binding. In contrast, there are two circumstances where the expert evidence given in the context of the WTO is binding<sup>290</sup>.

What is also of note is the lack of communication between the tribunals. In addition, there is little reference made from one tribunal to another, e.g. regarding the use of the *voir dire* before ITLOS.

## 6.2 Factors influencing the approach on expert evidence:

This section will begin to address what factors have an influence on the approach of the tribunals on expert evidence. However, the details will be left to the overall conclusion of thesis where all the influencing factors affecting many aspects of evidential rules across all three tribunals will be examined together.

The first influencing factor for the tribunals seems to be their history and the context in which they were created. For example, the provisions of the ICJ derived from those of the PCIJ, unavoidably inheriting some characteristics. The provisions of ITLOS have similarly been based on those of the ICJ. In contrast, the WTO was created to replace the old and inefficient GATT system. Consequently, the aim was to have an efficient, informed, and enforceable dispute settlement system. This difference in background of the tribunals could explain: a) the detailed provisions on

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<sup>290</sup> (a) advice from the IMF under Article XV:2 of the GATT which are binding upon GATT contracting parties and WTO members, (b) advice from the Permanent Group of Experts under Article 4.5 of the Subsidies Agreement.

the use of experts of the WTO, b) the extent some of the provisions went to establish permanent expert bodies, c) the frequent use of panel appointed experts.

Second, the nature of the cases can also have an influence on the use of experts. For example, in the context of the WTO, the panelists have said that cases only involving trade would not normally require external experts because there is already expertise within the panel and the Secretariat. This would explain the lack of the use of experts in some cases. However, in comparison with the ICJ and ITLOS, WTO disputes can more often involve very technical issues on health and the environment. This could also contribute to explain why the WTO has used independent experts more often than the other two tribunals.

Third, the tribunals must take the time limitation into consideration. This was clearly expressed by the judges of ITLOS where the cases have mostly been urgent. They further said that, if there was more time, the appointment of independent experts would have been plausible. There are also time restrictions within the context of the WTO<sup>291</sup>. This could result in the panels not exploiting the experts fully, e.g. not giving enough time for follow-up questions in the meeting, or cutting down time for the cross-examination process<sup>292</sup>.

Fourth, the question arises as to the influence of domestic rules on the approach of international tribunals. The tribunals do not seem to be adopting the approach of one legal tradition. In contrast, the general approach has been the amalgamation of the systems, giving as much scope for the submission of expert evidence as possible. However, the proceedings before the ICJ and ITLOS tend to resemble the Common Law tradition where, in addition to the written submissions, there is also the use of the oral testimony with the cross-examination process. In contrast, the WTO proceedings arguably resemble more the Civil Law tradition where the panel is in control with limited oral evidence.

### 6.3 Should there be a common approach on expert evidence?:

Like other chapters, the section will begin to address the question of whether there should be a common set of evidential rules by focusing on expert evidence.

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<sup>291</sup> DSU, 1994 article 12 and 20

<sup>292</sup> See generally for a critique of the WTO system: Pauwelyn, (2002) 362-365, Christoforou, (2000) esp. 635-648, Timura, (2002) 725-731

However, the details will be left to the overall conclusion where many aspects of evidential rules in all three tribunals will be examined.

As noted by judges/panellists, expert evidence is crucial to the outcome of the case. Consequently, the way in which they are used could have an effect on the outcome of the dispute. Taking into consideration that the tribunals examined could potentially have overlapping jurisdictions on similar disputes, if different rules on expert evidence are used, a different outcome could result from the same facts. This could happen in a case concerning trade and the marine environment, which could potentially come before ITLOS and the WTO DSB, two tribunals with different rules on expert evidence. This issue will be further explored in the overall conclusion. Further, the difference in the rules on experts could lead to forum shopping. Are these arguments enough to justify a more consistent approach on expert evidence? In addition, there is also the question of whether the dialogue and cooperation between the tribunals would increase if the question of the commonality was brought to the forefront.

However, because of the different nature of the disputes before the various tribunals, there is a case to be argued that different rules are needed to cope with the situation in each tribunal.

The overall conclusion will address the tension between the benefits and the disadvantages of having a common set of rules. It will further explore the extent to which this is a feasible option, and the way in which it could be implemented.

## Chapter 7: Conclusion

### Section 1: Introduction

As mentioned in the introduction, two recent developments make this thesis very timely on the question of the fragmentation of international law: a) the *Genocide Case*, b) the conclusions of the work of the Study Group on the Fragmentation of International Law. They are significant to the debate on the fragmentation of international law and the relationship of international tribunals. The *Genocide Case* has shown the new willingness of the ICJ to refer to the decisions of other permanent tribunals when needed, in this particular case the ICTY and the ICTR to a lesser extent. The work of the Study Group on the Fragmentation of International Law focuses on substantive law but also has bearing on the general debate. Even though the report is yet to be adopted by the ILC as a whole, the findings of the report may be significant in concluding that “international law is a legal system” and that “its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles”<sup>1</sup>. “International law is not a random collection of...norms”<sup>2</sup>. This shows that there is a more closely knit system emerging. Further, regarding harmonization, “when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations”<sup>3</sup>. This thesis is set within these latest developments.

This chapter addresses the three questions set out in the introduction<sup>4</sup>. Against the background of the proliferation of international tribunals, the main questions of the thesis are the following: a) is there an emerging set of common rules on evidence that would suggest a community of international tribunals?, b) what are the factors influencing the approach of the tribunals on evidential rules?, c) should there be a common set of rules on evidence for international tribunals, and if so, how should the solution be implemented?

These conclusions take account of the information gathered from the interviews. All the views of the judges expressed are presented and included in the section where they are relevant.

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<sup>1</sup> International Law Commission, (2006) para 1

<sup>2</sup> International Law Commission, (2006) para 1

<sup>3</sup> International Law Commission, (2006) para 4

<sup>4</sup> See: Chapter 1, Section 1.4, 10-12

## Section 2: The existence of a common approach on evidential rules:

The study of the constituent instruments and rules, jurisprudence and the interviews have given an insight into whether there is an emerging commonality<sup>5</sup> in evidential rules of the selected three tribunals:

### 2.1 Standard of proof

The practice of the selected tribunals has not indicated an emerging commonality on the rules on the standard of proof. The ICJ invoked and applied a variable standard of proof, including: a) the Common Law standards of beyond reasonable doubt in the *Corfu Channel Case*, b) “fully conclusive” proof in the *Genocide Case*, and c) the balance of probabilities in many cases but notably in the *Land, Island, and Maritime Frontier Dispute Case (El Salvador v. Honduras) Case*<sup>6</sup>. It also expressed the standard, *inter alia*, in terms of whether the evidence was “convincing” and “well-founded”. The Court has indicated, through the jurisprudence and the judges interviewed, that it has adopted a variable standard of proof, i.e. the more serious the nature of the allegation, the higher the standard applied. However, the Court has not always been explicit in spelling out the applicable standard to different cases, and the jurisprudence has not been consistent enough to suggest a clear answer.

ITLOS was equally unclear on the applicable standard of proof but the study has been more restricted because of its limited jurisprudence. The standard of proof has varied on a case by case basis, and have included the “balance of probabilities” and evidence being “well-founded”<sup>7</sup>. From the interviews, the judges gave a range of responses as to the applicable standard. The most significant case in this regard was the *Saiga (No. 2) Case* where Judge Wolfrum expressed concern on the lack of certainty on the standard of proof applied. Many of the judges have stated in the interviews that the standard can vary according to the seriousness of the allegation in the case.

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<sup>5</sup> See: Chapter 1, Section 1.4.1, 10

<sup>6</sup> See: Chapter 4, Section 3, 69-94

<sup>7</sup> See: Chapter 4, Section 4, 95-105



Regarding the WTO DSB, even though little is said in its constituent instruments on the standard of proof, the jurisprudence has been quite clear. The standard applied is a two stage test which requires the applicant to establish a *prima facie* case of a breach of a WTO obligation, and the respondent has to rebut it. The jurisprudence has shown that, if unrebutted, the *prima facie* case can be enough to render a judgment in favour of the applicant<sup>8</sup>. Consequently, the standard imposed on the applicant is low, and although debatable, the respondent has a much higher one.

In conclusion, there are differences on the standard of proof as applied by the three tribunals. However, there are similarities worth noting between the ICJ and ITLOS<sup>9</sup>. The constituent instruments of the two tribunals are similar because ITLOS's was based on the ICJ's. The lack of rules on the standard of proof could be one of the reasons behind the uncertainty before the two tribunals. Further, the ICJ and ITLOS have both adopted the variable standard of proof, even though, regarding ITLOS, this has only been learnt from the interviews. In contrast, the WTO DSB has adopted its two stage test. Commonality on the standard of proof is yet to develop.

## 2.2 *Amicus curiae* briefs

The practice of the three tribunals on *amicus curiae* briefs has again showed that, although there are similarities, their approaches have been different. The instruments of the ICJ provide for the submission of briefs from public international organizations in contentious cases. There has been limited use of this provision, only a few occasions in cases concerning the ICAO<sup>10</sup>. No NGO submissions have been allowed in contentious cases. The Court has been more open in advisory opinions where the Statute allows for submissions from States and international organizations. States and public international organizations have submitted briefs. The Court allowed on one occasion a brief from an NGO<sup>11</sup>. However, after that case, the Court seems to have taken a much more restrictive approach, and only recently opening up again. The judges interviewed also confirmed the recent open approach of the Court in advisory opinions.

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<sup>8</sup> See: Chapter 4, Section 5, 105-118

<sup>9</sup> See: Chapter 4, Section 6, 118-121

<sup>10</sup> See: Chapter 5, Section 3.3.2.1, 134-136

<sup>11</sup> *International Status of South-West Africa*, ICJ, 1950, See: Chapter 5, Section 3.3.2.2, 142

Again, the Statute of ITLOS resemble that of the ICJ and provide for intergovernmental organizations to submit briefs in contentious cases. In advisory opinions, there are provisions for States and intergovernmental organizations to submit briefs. However, partly due to the limited number of cases, there have not been any *amicus curiae* briefs submitted. The interviews of the judges have shown that the future of the Tribunal's approach is still uncertain. Some judges say that the Tribunal will be hesitant to take *amicus curiae* briefs, to concur with the practice of the ICJ. However, others are of the opinion that the Tribunal would take the opportunity to admit briefs<sup>12</sup>.

The question of the *amicus curiae* has been controversial in the WTO DSB<sup>13</sup>. There are no explicit provisions for such briefs but the jurisprudence has shown that, starting from the *US-Shrimp/Turtle Case*, *amicus curiae* briefs have been admitted at both the panel level and the AB level. There were further developments resulting in the Additional Procedure for the regulation of the submission of briefs in the *EC-Asbestos Case*, which was very contentious among the Members<sup>14</sup>. After this case, it was clear that many Members thought that accepting *amicus curiae* briefs was outside the mandate of the AB. Consequently, the WTO DSB has been cautious in approaching *amicus curiae* briefs. After the *EC-Asbestos Case*, even though they are admitted, they have never been used and referred to in the Reports.

In sum, even though there are similarities on the approach of tribunals on *amicus curiae* briefs, commonality on this issue has not developed.

### 2.3 Expert evidence

The approach of the three tribunals on expert evidence share similarities, but not to the extent that would suggest an emerging common set of rules. They have all adopted a flexible and open approach towards the admission of expert evidence. The parties can appoint experts as members of the delegation. These experts can give advice to the parties and incorporate their opinion into the written submission or plead before the tribunal as members of counsel. Parties can also call experts to give an oral testimony. Further, all three tribunals have the power to appoint its own experts if necessary.

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<sup>12</sup> See: Chapter 5, Section 4.4, 156-158

<sup>13</sup> See: Chapter 5, Section 5, in particular 5.3, 160-175

<sup>14</sup> See: Chapter 5, Section 5.3.3.2, 168

The provisions of the three tribunals provide for many channels of expert evidence, but tribunals and the parties have used them differently.

The expert evidence before the ICJ has primarily been through the use of written evidence<sup>15</sup>. However, there was also some use of oral expert testimony on a wide range of issues. Such oral proceedings resemble the Common Law tradition with a cross-examination process. The Court's jurisprudence has confirmed the right to call experts. On occasion, the Court has also used its own appointed experts according to Article 50 of the Statute.

The use of experts before ITLOS has resembled to a large extent to that before the ICJ<sup>16</sup>. In the Tribunal's limited jurisprudence, the parties have submitted expert evidence via written submissions. In a higher proportion than cases before the ICJ, parties have also called experts to give oral testimonies. They were also examined in a way resembling the Common Law tradition with the cross-examination process. The Tribunal has been flexible in applying the provisions on expert evidence, as shown by the introduction of the *voir dire* which was not explicitly provided for. However, ITLOS has been the only tribunal from the three selected that has not appointed its own experts<sup>17</sup>. The judges said that the main reason has been the lack of time, and that independent experts could be used in full merits cases before the Tribunal in the future.

In contrast, the use of expert evidence has been different before the WTO DSB<sup>18</sup>. Expert evidence on facts is limited to the panel stage. In contrast to the other two tribunals, the provisions of the WTO DSB are more detailed on the use of experts. There are other specific agreements under the WTO framework in addition to the DSU which provide for expert evidence. Some of these set up permanent bodies, and their findings can be binding on the panel<sup>19</sup>. However, they have never been used. In practice, the parties include expert evidence as part of the written submissions. Party oral expert testimony has a limited role.

The DSU also provides the panel with the power to appoint expert review groups or individual experts<sup>20</sup>. Expert review groups have never been used. The panels have been willing to appoint its own experts in cases concerning technical non-

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<sup>15</sup> See: Chapter 6, Section 3, 183-202

<sup>16</sup> See: Chapter 6, Section 4, 205-226

<sup>17</sup> Although it sought to do so in *The Southern Bluefin Tuna Cases*, ITLOS, 1999. See: Chapter 6, Section 4.4, 221-222

<sup>18</sup> See: Chapter 6, Section 5, 226-243

<sup>19</sup> See Chapter 6, Section 5.3.1.1, 229

<sup>20</sup> See Chapter 6, Section 5.3.1.1, 227-229

trade issues. For example, scientists have been used in cases involving the safety of the use of hormones in beef and the IMF has been consulted on issues of the balance of payment<sup>21</sup>. The questions from the panel to the experts and their replies are usually written. The parties have the opportunity to put questions to the experts, but the jurisprudence has shown that this has been limited and the experts are not scrutinized as much compared to the other two tribunals. The details of the questions and the answers are included in the final report.

Comparable to the case with *amicus curiae* briefs, there are some similarities which the tribunals share on the question of experts. However, it is not enough to suggest that commonality with regard to this aspect of the rules is developing.

#### 2.4 Has the proliferation of international tribunals brought the issue of commonality to the forefront?

The overall impression from the practice of the three bodies and from interviews is that the judges of all three tribunals are aware of the phenomenon of the proliferation of international tribunals. However, it has not brought the issue of evidential rules to the forefront. Tribunals have not given priority to this issue. For example, in the context of the WTO, Panelist L has stated that, despite the increase of the number of international tribunals, the focus of the panel has been on the application of the provisions of the DSU.

Despite the low profile of evidential rules for international tribunals, a few judges seem to be increasingly conscious of its potential importance. Judge A stated that the debate on the issue has been louder in the past few years and the questions have become more pertinent. Even though there is greater awareness of the problem, he added that the ICJ has not addressed the problem in an organized way. Judge E of ITLOS said that he, and the Tribunal, are becoming aware of the increase in the number of tribunals, and the potential problems from inconsistent rules on evidence. He further noted that this is a problem that could also arise in the domestic context<sup>22</sup> and is not unique to international tribunals. Judge J suggested that once there are more cases, evidential rules would be granted more importance from ITLOS.

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<sup>21</sup> See: Chapter 6, Section 5.3.2.4, 236

<sup>22</sup> E.g. Problems arising from the rules which are sometimes unclear.

## 2.5 Dialogue within each tribunal

The judges of the ICJ and ITLOS on the whole observed that the dialogue within the tribunal has been good. The judges of the two tribunals stated that there is opportunity for thorough discussion during the deliberations<sup>23</sup>. For example, *amicus curiae* briefs have been addressed by ITLOS<sup>24</sup>. As for the WTO DSB, the panelists have said that there is good dialogue within one panel. Any disagreement is discussed thoroughly with the chairman taking a leading role within a panel. However, there is no dialogue between the different panels, considering themselves as separate individual units. Panelist M has noted that, because of their temporary nature, there is no collegiate atmosphere between the panels and there is little opportunity for a dialogue

What is significant for this thesis is that, despite the dialogue between the judges, there is still a lack of clarity in many aspects of evidential rules. In many cases, judges of the same tribunal have expressed different views on what the appropriate evidential rules should be. For example, the judges of the ICJ and ITLOS have stated different standards of proof in the same case before their respective tribunal<sup>25</sup>. Interviews have also shown that there are different views from the judges of ITLOS as to the stance of the Tribunal on *amicus curiae* briefs<sup>26</sup>. The lack of agreement of the judges could indicate: a) an emerging set of common rules seem unlikely if there is disagreement within a tribunal, b) the judges might not be granting much importance to evidential rules, not prioritizing agreement, c) evidential rules are technical and hard to agree upon, d) the development of a common set of rules could face many challenges.

## 2.6 Dialogue between the tribunals

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<sup>23</sup> Judge H and D of ITLOS have stated that the internal dialogue has been "excellent".

<sup>24</sup> As suggested by Judge H.

<sup>25</sup> See generally: Chapter 4, Section 4-5, 95-118

<sup>26</sup> See: Chapter 4, Section 4.4, 101-103

The interviews have shown that formal dialogue between the tribunals has been minimal and always informal.<sup>27</sup> However, there was a mixture of responses regarding informal dialogue between individual judges.

Judges of the ICJ indicated that there is as yet to be formal dialogue with other tribunals. However, Judge A noted that there have been visits to other tribunals, e.g. the President of the Court visited ITLOS in late 2006. One judge indicated that there is more informal inter-tribunal dialogue now, on both substantive and technical issues<sup>28</sup>. These informal dialogues are happening at dinners or private gatherings of judges.

The judges of ITLOS have confirmed that there is not much formal dialogue between international tribunals. However, many judges have suggested that there is informal dialogue between the judges<sup>29</sup>. Judge D said he is personally willing to meet judges of other tribunals but problems might arise from the lack of willingness of the ICJ judges. He further noted that the amount of dialogue depends on the personality of the judges, and that dialogue could also be carried out between the registrars. Judge J stated that a dialogue between international tribunals has started, but has not taken off as yet. He added that the dialogue so far concerned general points of procedural issues, and the lack of dialogue has partly been a result of politics between the tribunals. One judge expressed the view that the informal dialogue between the judges is also limited<sup>30</sup>.

The WTO panelists have confirmed that there is no formal dialogue between the tribunals. In contrast to the other two tribunals, the panelists suggested that there is also little informal dialogue. Panels consider themselves as bodies with their own rules. Further, the temporary nature of panels has resulted in no extended dialogue between the panelists and judges of other tribunals. One panelist underlined the role of the Secretariat of communicating with other tribunals.

The question of whether the judges think more dialogue is needed will be addressed later in the chapter.

## 2.7 Reference to other tribunal's jurisprudence

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<sup>27</sup> See: Appendix E, question 3.

<sup>28</sup> Judge C.

<sup>29</sup> E.g. Judge D

<sup>30</sup> Judge H

At interviews carried out prior to the *Genocide Case*, the views of the judges of the ICJ were divided on the reference to other tribunal's jurisprudence. Judge A said that the Court does not generally look at the jurisprudence of other tribunals. He made the observation that some judges take the attitude that the ICJ is the "Big Brother", "almost to the point of arrogance"<sup>31</sup> on this issue. Judge A further stated that some judges think that this is reflected in the budgeting structure of international tribunals, i.e. the ICJ gets more money than other tribunals. In one case, during deliberations, Judge A wanted to draw attention of the Court to another case before another tribunal for comparison. However, one judge had strong opinions that the Court should not be referring to a smaller tribunal. Judge A stated that the ICTY is the most likely candidate for references<sup>32</sup>. But Judge B has noted that the nature of the cases before the ICTY is quite different to those before the Court. However, Judge C has stated that the Court does on occasion look at the jurisprudence of other tribunals.

However, what was said in the interviews must be seen in a new light after the *Genocide Case*. This case is significant because, for the first time (to the knowledge of the writer), the ICJ has referred to the judgment of another tribunal in determining the outcome of its own, although it as referred before to arbitral awards. The ICJ referred to the judgment of the ICTY on many issues such as the issue of the intention of genocide<sup>33</sup> and ethnic cleansing<sup>34</sup>. The Court also referred to cases of the ICTR, but to a lesser extent<sup>35</sup>. Further, documents used in cases before the ICTY were used by the ICJ<sup>36</sup>. The reference of the ICJ to the jurisprudence of other tribunals could be an indication of their intention to begin a dialogue between tribunals. Did the judges who support referring to other tribunals win over the judges who were against? However, it might have merely been due to the similarities of the nature of the cases. Would the Court refer to other tribunals on other types of cases? The answer will no doubt be revealed with new judgments of the Court.

Judges of ITLOS have commented that the Tribunal has referred to the jurisprudence of other tribunals, especially the ICJ. They try to establish consistency

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<sup>31</sup> As expressed by Judge A.

<sup>32</sup> Judge C agrees.

<sup>33</sup> *The Genocide Case*, ICJ, 2007 para 188

<sup>34</sup> *The Genocide Case*, ICJ, 2007 para 190

<sup>35</sup> E.g. *The Genocide Case*, ICJ, 2007 para 300

<sup>36</sup> E.g. *The Genocide Case*, ICJ, 2007 para 206

of evidential rules of international tribunals, and look to the ICJ<sup>37</sup>. This is done by looking at the published cases of the Court<sup>38</sup>. However, this can be difficult because of the lack of clarity and consistency of the jurisprudence<sup>39</sup>. Judges add that, in addition to the ICJ, the Tribunal also looks to other tribunals but with caution. Judge I stated that, other Tribunals such as the WTO would bear less weight. A reason why there could be more references to the ICJ is because it shares types of cases with ITLOS. Judge J added that, if the Tribunal shares a case with another tribunal, it would try to take the same approach unless there is a good reason not to.

Judge G stated that the Tribunal is aware of what is going on in other tribunals. However, the Tribunal must be careful in applying the same rules when the nature of the disputes is different. For example, the Tribunal has jurisdiction over prompt release cases, and time restrictions on prompt release and provisional measures cases. Nonetheless, Judge G said some evidential rules could be common to many tribunals. Several judges of ITLOS commented that the ICJ has referred to its jurisprudence, especially on the recent question of the binding nature of provisional measures<sup>40</sup>.

Regarding the WTO DSB, the panelists have observed that the panels do not look at other tribunals, not even the ICJ. They regard themselves as having their own rules, different from other Tribunals. However, Panelist L added that he personally does look at the jurisprudence of other tribunals to the extent possible, e.g. the rules of the ICJ, ICSID, UNCITRAL. But this is in a more general context. As well as seeing the practice of other tribunals, it is also to indicate how evidential rules should not be applied.

## 2.8 Conclusion:

The research has shown that the tribunals do share a level of commonality on evidential rules. For example, none of the three tribunals have adopted rules which are excessively formalistic<sup>41</sup>. Several judges have indicated that one of the reasons

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<sup>37</sup> Expressed by Judge E, I.

<sup>38</sup> Judge I

<sup>39</sup> Judge E

<sup>40</sup> The interviews show that the ICJ judges do not share this view.

<sup>41</sup> This characteristic has not changed since the earlier period of international litigation, as noted by Sandifer: Sandifer, (1975) 189, 457, 8. On the restrictions on evidential rules that do exist, see: Sandifer, (1975) 186 and Egbert, (1939) 155. See further: Sandifer, (1975) 42



behind this is the lack of evidence in international litigation. The tribunals need to adopt rules permitting as much evidence to be submitted as possible.

In addition to the flexibility of the tribunals' approach, the research has shown that there has been a level of cross-fertilization on the rules on evidence<sup>42</sup> and this has been confirmed by many of the judges interviewed<sup>43</sup>. For example, the approach of the ICJ and ITLOS on experts is similar to a large extent, and resembles the Common Law tradition.

Despite the similarities that the tribunals share, it is not sufficient to suggest an emerging common set of rules on evidence, or an established community of international tribunals. Even though there are references made to each other's jurisprudence on evidential rules, this has neither been widely practiced nor consistent. The judges have further indicated that the dialogue on evidential rules has been minimal, and informal. What further supports the argument on the lack of an emerging commonality is the disagreement on evidential rules within each individual tribunal. If this is the case, it is difficult to see how there could be said to be an emerging common set of rules among different tribunals.

### Section 3: The influencing factors on the approach of the tribunals

Chapters Three to Six have shown the variety of factors that influence the approach of international tribunals on evidential rules. Concerning the ICJ, a scholar has suggested that "the Court seems to have reworked the rules of evidence which it does apply with three objects in mind: (1) to bridge the gap left by the non-production of evidence, (2) to enable the Court to weigh the evidence submitted, and (3) to allow the opposing party to meet the evidence introduced."<sup>44</sup> The factors below are those gathered through this research, and some reflect those suggested by Bentham as considerations by courts in diverging from the Freedom of Proof<sup>45</sup>.

#### 3.1 The judges:

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<sup>42</sup> Scholars have suggested that international tribunals have looked at one another's jurisprudence since the earlier period of international litigation. See further: Sandifer, (1975) 44. See the recent study: Brown, (2004)

<sup>43</sup> E.g. Judge I

<sup>44</sup> Alford, (1958) 81

<sup>45</sup> See Chapter 3, Section 2, 41-47

There is no doubt that the identity of the judges has an influence on the approach of the tribunal on evidential rules<sup>46</sup>. This has been expressed by the judges of all three tribunals.

First, the background of the judges can have an impact. For example, in the context of the ICJ, concerning the standard of proof, Judge B has expressed that a reason why the Court cannot establish clear rules was due to the disagreement between the judges who are roughly grouped into the Civil Law tradition on one hand, and the Common Law tradition on the other. Some Civil Law judges do not agree with the cross-examination process of the ICJ. Further, Judge B pointed out that the judge's legal training also has an influence, e.g. whether he has been received training as a barrister. The judges trained as such, when compared to judges who are "legal diplomats", can more easily spot the issues which would have otherwise gone undetected.

In the context of ITLOS, Judge E also confirmed the Civil/Common law divide in the approach of the judges. For example, the Common Law judge would look into all the facts of the case whereas the Civil Law judge would ask for the relevant facts. He also noted that, generally, the international law judge resembles more the Common Law judge, being passive in the proceedings. Judge H added that a judge could be skeptical about adopting procedures which he is not accustomed to. Judge G noted that since there are few evidential rules from the provisions of the Tribunal, the background of the judge is important in determining the approach. Judge H thought that judges must be open to new procedures and developments. Judge J added that the training of the judges can also determine the approach of the Tribunal. For example, "legal diplomats", i.e. those judges who did not practice in their own jurisdiction, are generally not too concerned about technical procedural rules.

In the context of the WTO, Panelist L stated that the background of the judges does matter especially on the question of the interpretation of the DSU. Different legal traditions interpret the same WTO provision differently. Each panelist brings alternative perspectives into the interpretation of the provisions, which are discussed. In contrast, Panelist K noted that when he acted as a panelist, the input from the Civil Lawyers and the Common Lawyers were not that different.

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<sup>46</sup> See further: Sandifer, (1975) 11-12, Witenberg, (1951) 335, and Cheng, (1953b) 335

Further, and unique to the WTO, there is also a distinction between the panelists who are lawyers and those who are not. Panelist L noted that the non-lawyers are generally not concerned with technicalities such as the rules of evidence. They do not really understand the issues. Panelist M underlined the role of the chairman in trying to find an accepted solution when the panelists cannot agree.

Further, the number of judges can potentially influence the approach of the tribunals. The ICJ has 15 judges, ITLOS has 21, but the WTO only has 3 sitting at both the panel level and the appeal level. A large number of judges (e.g. the ICJ and ITLOS) could find it more difficult to arrive at a consensus on a particular approach on a technical issue such as evidential rules. In the context of the WTO, there are only 3 panellists or AB Members sitting at any one time (7 AB Members altogether when they confer for consistency according to WTO provisions) which makes agreement easier. This distinction could explain why the ICJ and ITLOS have not been precise on aspects of evidential rules compared to the WTO. Further, it could explain the many dissenting opinions in judgments of the ICJ and ITLOS.

### 3.2 Limitation of resources:

An important factor influencing the approach of international tribunals is the limitation of resources, the first one being time. First, tribunals can be restricted by the nature of the case itself, e.g. provisional measures cases and prompt release cases which require the tribunal to as expeditious as possible. Second, in full merits cases, tribunals will need to find a balance on the admission of evidence to make the litigation as efficient as possible.

The judges of ITLOS have expressed that time restriction is particularly pertinent for the Tribunal because the majority of its cases have been prompt release and provisional measures cases. The Tribunal has to concentrate on certain aspects of the case submitted, and does not preoccupy itself with issues that can be left undecided. Some judges expressed that tribunal-appointed experts were not used because of the time limit. Using tribunal-appointed experts for every case would mean long delays: in obtaining the views of the Parties, in issuing an Order, providing time for the experts to carry out their enquiry, and giving the Parties time to respond to it. The judges suggested that, time permitting, the Tribunal could appoint its own experts in the future.

As well as time restrictions, Judge H of ITLOS noted that tribunals also take into account how to conduct the case in the most cost-effective way. Because tribunals have to pay for their own appointed experts<sup>47</sup>, could the lack of financial resources explain why they have not been used more often?

The different way in which assistants or clerks are used by the tribunals can also have effects on evidential rules, as is apparent from the interviews. For example, the limited role of the secretariat of the ICJ and ITLOS has meant that, if needed, the judges must seek independent advice. In contrast, the WTO panelists have underlined the important role of its Secretariat in supplying expert advice or acting as a point of reference where any questions can be referred<sup>48</sup>.

### 3.3 The nature of the case:

The effect of the nature of the case on evidential rules is apparent. Regarding the ICJ, the wide range of cases that could come before the Court could be a reason for its flexible approach on the standard of proof. The variable standard of proof, contingent on the seriousness of the allegation in the case, has been expressed by the judges of the Court. For example, cases involving acts resembling those of a criminal nature would require a higher standard than those cases involving boundary limitations<sup>49</sup>. Further, cases which are very technical in nature could also prompt the Court to appoint independent experts, e.g. cartographers<sup>50</sup>.

Similarly, before ITLOS, the nature of the cases has also affected the Tribunal's approach on evidential rules. For example, as mentioned by the judges, the rules applied by the Tribunal have taken into account that most of the Tribunal's cases have either been prompt release or provisional measures cases, e.g. urgency is required. Further, could the flexible standard of proof be a reflection of the range of cases: prompt release, provisional measures and merits cases?

In the context of the WTO, Panelist M confirmed that the nature of the case can determine the approach of the tribunal on evidential rules. For example, external experts would not be used in cases only concerning trade but in cases concerning technical issues such as health or the environment. Further, the relatively clear

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<sup>47</sup> E.g. *Rules of Court*, 1978 art. 68

<sup>48</sup> See: Chapter 6, Section 5.4, 141-143

<sup>49</sup> See: Chapter 4, Section 3, 69-95

<sup>50</sup> See: Chapter 6, Section 3.4.2.4, 195-200

standard of proof before the WTO DSB could reflect the more consistent nature of the cases only involving barriers to trade.

### 3.4 The conduct of the parties:

Panelist M indicated that the conduct of the parties could have an effect on the approach of the tribunal. For example, the amount of evidence put forward by the parties, or whether the evidence produced by one party is challenged by another, could determine if there is a need to appoint independent experts. The importance of the conduct of the parties has also been confirmed by Judge E of ITLOS.

### 3.5 References to the jurisprudence of other tribunals:

In some circumstances, the jurisprudence of other tribunals can influence a tribunal's approach on evidence. For example, ITLOS looks to the jurisprudence of the ICJ and tries to conform unless there is reason not to. This has been addressed in detail in a previous section<sup>51</sup>.

### 3.6 The nature of international litigation:

The particular characteristics of international litigation can have an influence on evidential rules. First, the provisions of the tribunals have been drafted by States, resulting in a level of deference to them. This is reflected in rules allowing much flexibility.

Further, the scope of inter-State litigation can be wider than domestic disputes and the relationship between two States may also depend on the proceedings. "The importance of the interests at stake [in international litigation] precludes excessive or decisive reliance upon formal and technical rules"<sup>52</sup>. There is concern that the result of international litigation should not turn on a point of procedure, but on the facts of the case.

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<sup>51</sup> See: Chapter 7, Section 2.4-2.7, 252-257

<sup>52</sup> Lauterpacht, (1958) 366

Another characteristic of international litigation is that evidence is difficult to obtain and prepare<sup>53</sup>, caused by a range of factors including: a) the longer time elapsed between the events and the proceedings, b) the greater distance between the trial and the place of the events, c) the poor conditions of some written records. As noted by scholars, this has meant that parties have had to submit all the evidence available<sup>54</sup>.

In addition, tribunals were created and exist as separate entities. Because there are no formal inter-tribunal channels of communication, there has been minimal dialogue and only some references between them.

### 3.7 The extent of deference of tribunals to States

Because of State sovereignty, tribunals can be inclined to grant them deference and refrain from imposing rules restricting the freedom of States. This was expressed early on in the *Lotus Case* before the PCIJ<sup>55</sup>, and also confirmed in the interviews of this research. One judge said that international tribunals have to try to please both parties.

Regarding the use of tribunal-appointed experts, judges expressed the view that the tribunals must be cautious because they are dealing with sovereign States. The tribunals must not be too active in seeking its own information, but allow the parties to present what it considers to be relevant information. Further, the tribunals rely on States to create work. A restrictive approach could deter them from using the forum.

The ICJ and ITLOS arguably have more deference to States than the WTO DSB. The rules of the former two grant much flexibility whereas the rules and the timetables of the WTO DSB are more precise. This distinction could be a result of the context in which they were created. The recent WTO DSB could indicate that the nature of international litigation is shifting towards tribunals granting less deference to States. States have also been more willing to give their consent to undergo compulsory dispute settlement. In the 19<sup>th</sup> century, international litigation was very

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<sup>53</sup> See further: Sandifer, (1975) 24-29. In the earlier period of international litigation, tribunals have to cope with the lack of evidence, see: Alford, (1958) 91

<sup>54</sup> Sandifer, (1975) 457, 181-182

<sup>55</sup> *The Lotus Case*, PCIJ, 1927, para 3

flexible with very few rules<sup>56</sup>. Any rules created were for a particular forum. This gradually changed with the introduction of the PCIJ with permanent rules. For the first time, there was an option for States to be subject to compulsory jurisdiction without a special agreement. In recent years, the WTO DSB being a good example, tribunals have arguably given less deference to States. There are more tribunals with compulsory jurisdiction. The procedural rules have become more detailed and arguably more restrictive in order to regulate the disputes more efficiently, e.g. the time-frame introduced under the WTO system<sup>57</sup>.

### 3.8 The policy of the tribunals towards commonality

The tribunal's policy towards the notion of commonality could affect evidential rules. The interviews have uncovered that the proliferation of international tribunals has not generally been a consideration of the judges in deciding the approach on evidential rules<sup>58</sup>. The proliferation has not brought the issue of the commonality of evidential rules to the forefront. However, a number of judges noted that evidential rules in the context of the proliferation of tribunals should be addressed in the near future.

### 3.9 Incentive of States to use the tribunals:

The ICJ and ITLOS have arguably adopted flexible rules as incentive for States to use them as the forum of choice. Since the basis of the jurisdiction of tribunals is different, those without compulsory jurisdiction, e.g. the ICJ and ITLOS, could be inclined to grant more deference to States. Tribunals adopting rigid rules of procedure could deter States from using them altogether. A tribunal with compulsory jurisdiction, e.g. the WTO DSB, need not introduce flexible rules to attract States.

### 3.10 The existence of the Appellate Body:

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<sup>56</sup> See: Chapter 2, Section 3, in particular 3.3, 26-32

<sup>57</sup> *Dispute Settlement Understanding*, 1994 Article 20. Lapradelle suggested that, even though States are sovereign, they have transferred the power over the dispute to tribunals. Consequently, tribunals can consider what rules are appropriate, see: Lapradelle and Politis, (1957) 537-538

<sup>58</sup> See: Appendix E

One reason why procedural rules of the WTO DSB have been consistent and clearer than those of the ICJ and ITLOS is no doubt because of the AB. The AB can add, revise, or confirm points of law from the Panel report helping to build a clear set of rules. For example, the jurisprudence of the ICJ shows inconsistencies in the applied standard of proof. If there were to be an appellate body, these points of law might have been clarified. The same argument applies for ITLOS.

### 3.11 Municipal rules on evidence:

Municipal rules on evidence can also influence the rules of international tribunals. However, this is not explicit in the provisions. The practice of the tribunals equally does not indicate an adoption of a particular legal tradition's approach on evidence. The tribunals seem to be incorporating the approaches of many legal traditions allowing for flexibility, and opening as many channels as possible for the submission of evidence. Judge F of ITLOS observed that, with 21 judges, the Tribunal could have difficulty applying the approach of one tradition.

Interviews with judges have shown that their background can have an influence on the approach of the tribunal. Most of them indicated that there is the Civil/Common Law divide, meaning that the judges from different legal traditions will approach evidential rules differently. For example, this could be in the interpretation of existing provisions.

Parties can also introduce the practice from their own tradition into the proceedings of international tribunals. A good example was the *Corfu Channel Case* where it has been argued that because the UK was involved in this first case of the ICJ, its proceedings started to use Common Law style oral examinations which still carry on today<sup>59</sup>. Further, parties can request the tribunal to allow specific procedures, as was done before ITLOS on the *voir dire*, a procedure originating in the Common Law tradition<sup>60</sup>.

### 3.12 The context and history of the tribunals:

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<sup>59</sup> Rosenne, (1995) 156

<sup>60</sup> See: Chapter 4, Section 4.3.1, 97-100



Many of the influencing factors above have arisen because tribunals were created within different contexts. For example, the reason why the provisions of ITLOS resemble those of the ICJ is no doubt partly because it was created after the ICJ, and both tribunals are within the UN framework. In contrast, the WTO is not part of the UN framework but created as the replacement for the inefficient GATT. Members of the new WTO were keen to ensure that obligations under the agreement were met, introducing enforcement mechanisms.

Other influencing factors such as how much references are made between the tribunals, and their level of deference to States, are also partly the result of the context in which the tribunals were created.

### 3.13 Preliminary Conclusion

The factors above can influence the approach of international tribunals on evidential rules. A range of factors will contribute to the overall result of the approach of each tribunal, each one having different predominant influencing factors.

## Section 4: Should there be a common approach to evidential rules?

The final section of this chapter will answer this last question by addressing the clear tension between the advantages and disadvantages of commonality. It will show that the advantages of commonality outweigh the disadvantages:

### 4.1 The Advantages:

#### 4.1.1 Clarity of rules:

The research has shown that the tribunals' provisions do not address the issue of evidential rules in detail, the DSU of the WTO DSB being the most detailed of the three<sup>61</sup>. Many judges from the interviews have indicated that the most significant advantage of a common set of evidential rules is that all the tribunals must pay

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<sup>61</sup> See: Chapter 4, Section 5.2, 105-106; Chapter 5, Section 5.2, 160-161; Chapter 6, Section 5.3.1, 227

attention to the debate and can address particular issues, even if an entirely common set of rules is not achieved.

Many judges further remarked that, at the moment, because evidential rules are not concrete, the parties have to face uncertainty of the proceedings. Filling in gaps in the provisions by addressing the question of commonality can provide clarity and predictability for the parties. Judge A of the ICJ had concerns on this issue, giving the example of the *Oil Platforms Case* where the parties did not know what evidential rules were to be applied<sup>62</sup>. The situation could improve if a common set of rules was established. Existing rules or practice can be set out. For example, hearsay evidence is allowed before the ICJ, but not the ICTY. Judge B said that a common set of rules would help to “articulate” what the court is doing.

Judge H of ITLOS agreed that adopting a common set of rules would add clarity to the current rules. Further, it will make the parties more comfortable with litigation. Panelist K of the WTO added that some rules governing certain aspects of the WTO do not function well. Trying to achieve commonality would address these problems.

#### 4.1.2 Commonality producing consistent approaches to judgments:

The proliferation of international tribunals has meant the overlapping of jurisdiction of different tribunals over the same types of dispute<sup>63</sup>. For example, both the ICJ and ITLOS have jurisdiction over maritime delimitation. This raises the possibility of parties submitting the same disputes or disputes arising from the same set of facts to two different tribunals. Although unlikely, it is possible and the possibility increases with the number of tribunals and the number of inter-state disputes<sup>64</sup>.

First, the ICJ and the WTO DSB could have overlapping jurisdiction. A good example of this would be the *Oil Platforms Case*<sup>65</sup>. In this case, the ICJ based its jurisdiction on the 1955 Treaty of Amity, Economic Relations and Consular Rights between the US and Iran. Iran brought a claim that the US had breached Article X of

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<sup>62</sup> *Oil Platforms Case*, ICJ, 2003

<sup>63</sup> One ITLOS judge expressed the opinion that the overlapping jurisdiction is good because there could be reasons why a particular State would not come before a particular tribunal. Reasons could be political or it could concern issues like secrecy.

<sup>64</sup> Many of the judges noted that the overlapping of the jurisdiction of the tribunals is unlikely. However, they cannot deny that it will be more likely in the future as there are more cases before the increasing number of tribunals.

<sup>65</sup> *Oil Platforms Case*, ICJ, 2003; See: Chapter 4, Section 3.3.2.3, 84-87

the Treaty on the freedom of commerce and navigation. What is significant for this thesis is that, if Iran had been a member of the WTO, because the dispute concerned trade, the dispute could have equally been before the WTO DSB. Another example of a potential overlap in jurisdiction between the ICJ and the WTO would be where a Free Trade Agreement (FTA), for political reasons, had a dispute settlement clause referring disputes to the ICJ. Because an FTA often stipulates the obligations already laid down in the WTO Agreement, both tribunals could have jurisdiction over the same obligations. For example, a dispute could concern State A, State B, and State C. Regarding the same obligations, State A and B could decide to submit the dispute to the WTO DSB, and State A and C decide to submit it to the ICJ.

Second, the ICJ and ITLOS can have overlapping jurisdictions. This overlap is specifically provided for in UNCLOS where the parties can choose, among other fora, whether to use the ICJ or ITLOS as the dispute settlement body of choice. Such disputes could be maritime delimitations. There could be a dispute involving a common maritime boundary of three States. Again, State A and B could submit a dispute on one part of the boundary to the ICJ, and State A and C could submit a dispute on another part of the boundary to ITLOS. Being the same boundary, the tribunals would have to address the same issues. Further, different disputes could share many aspects. For example, there could be two different maritime boundary disputes: one involving fisheries and the other pollution. Consequently, these two disputes between the same two States on the same boundary could be submitted to two different tribunals.

Third, the WTO DSB and ITLOS can also have overlapping jurisdiction. This has already happened in the dispute between Chile and EU concerning the fishing of swordfish off the coast of the former by the latter. In the context of the WTO, the EU requested consultations with Chile on the prohibition of the unloading of swordfish, through a Chilean measure, in Chilean ports. The EU argued that this, as a result, transit through the ports was impossible for swordfish, and this was inconsistent with GATT. Before ITLOS, Chile and the EU requested a Special Chamber to be created to address, *inter alia*, whether: a) the EU has complied with UNCLOS to ensure the conservation of swordfish in its activities on the high seas adjacent to the EEZ of Chile, b) the Chilean measure, in purporting to apply conservation measures, breached UNCLOS. However, neither the WTO DSB nor ITLOS has delivered a judgment on the dispute because the parties reached an arrangement out of court. Nonetheless, the

two cases are still in the docket of the two tribunals should the parties decide to take it further.

Once of the consequences of the overlapping jurisdictions of tribunals together with different evidential rules is two tribunals reaching two different conclusions on the same set of facts. For example, in the second example given where the ICJ and ITLOS have overlapping jurisdiction on a maritime delimitation, the standard of proof could prove crucial to the case. The standards of proof of the two tribunals have not been clearly fixed, so they could consequently be different. If there was a crucial fact to be proven, such as whether a rock formation is to be considered as an island or a low-tide elevation for the purposes of the delimitation, the standard of proof could be decisive. There might be enough evidence to satisfy one standard as applied by one tribunal, but not the other.

Another example of how different evidential rules could determine the outcome of a case can be taken from the example of the ICJ and the WTO DSB. As noted above, these tribunals have different practices regarding the use of experts<sup>66</sup>. The ICJ depends largely on evidence presented by the parties, both written and oral. However, in cases involving technical issues, the panels of the WTO have made extensive use of their own appointed experts. Party experts tend to present more extreme views on issues when compared to the independent experts who generally present a more balanced and complete picture. This difference in the evidence presented could potentially render difference judgments from the same case.

Establishing one set of common rules on evidence would minimize the chance of tribunals reaching different conclusions when the facts of cases are the same and the applicable legal rules are the same or similar. This would also reduce the problem of how to reconcile two contradicting judgments. Currently, this question has not been addressed and would be difficult to answer because there is no hierarchy between the tribunals.

However, Judge E argued that common evidential rules would not necessarily help the consistency of judgments because the same rules would still be subject to different interpretation of the judges who bring in a level of subjectivity. However, the writer disagrees with this view. Even if there is subjectivity, having a common set of rules would still narrow down the way evidential rules can be applied.

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<sup>66</sup> See: Chapter 6, 179-247

Judge G of ITLOS added that even though different tribunals have different evidential rules, if the same dispute were before two fora, the tribunals would try to reach the same conclusion even if through different reasoning. Nonetheless, Judge G sees the problem that could arise from different evidential rules. But, in his opinion, the harmonization process will happen by itself with time. As there is more dialogue between tribunals, their approaches will merge. The tribunals must be seen as a community now and not isolated entities.

However, Judge H noted that problems arising from overlapping jurisdictions are not merely the result of different evidential rules, but it could certainly contribute to the problem. One of the judges commented that there has always been overlapping jurisdictions between international tribunals. However, their recent increase has drawn attention to the potential problem. Judge I of ITLOS noted that tribunals must take into account that, in many cases which seem to overlap, the different tribunals are actually looking at two different aspects of the same case. However, there could also be cases where two tribunals are looking at the same aspect of the case.

As a preliminary conclusion, the risk of overlapping jurisdictions of different tribunals on the same case is real. Consequently, because of different evidential rules, tribunals can reach different conclusions on the same dispute. This problem is recognised by many of the judges interviewed. However, some judges noted that common rules would still be subject to interpretation of individual judges, or the difference in evidential rules is only a factor in creating the problems from overlapping jurisdictions.

#### 4.1.3 Problems arising in the future:

As noted above, different judgments from different tribunals on the same dispute can lead to potential problems, e.g. reconciling inconsistent judgments. With the increasing interaction between States and more international tribunals, this problem could worsen in the coming years. The inconsistency could cause problems in the jurisprudence in terms of referencing to the old case law. For example, should a dispute occur in the future with a similar set of facts to two conflicting judgments from two different tribunals, questions would arise as to which judgment could be used as precedent. The agents of the two parties in the new case would no doubt refer

to the case that suited their argument. This potential problem could be minimized by adopting a common set of rules on evidence.

#### 4.1.4 Clarity for the parties

A common set of evidential rules can provide clarity for the litigating parties<sup>67</sup>. If the parties are unaware of what rules the tribunals will apply, then they will face great uncertainty. For example, this could be facing uncertain standards of proof, or what experts the tribunal will use. In fact, clarification for the parties has been an important reason expressed by judges interviewed for the adoption of common evidential rules. Judge H has observed that this could put the parties more at ease<sup>68</sup>. Judge A also expressed his concern over the unsatisfactory state of some of the evidential rules, leaving the parties unaware of what rules are to be applied by the Court. Common evidential rules can facilitate the litigation of the parties by making the process less complex. In turn, this could encourage States to use international tribunals. Further, commonality could encourage tribunals to fill in gaps in the provisions.

#### 4.1.5 Stepping towards an “integrated system” of international tribunals:

The proliferation of international tribunals has raised questions of whether the existing fragmented system where tribunals function as separate entities should continue, or whether they should operate in a more “integrated system” of tribunals where there is more dialogue and the bond between them is more formalized and defined. This question is yet to be answered, and up to States and tribunals to determine. However, should a more integrated system be desired, then adopting commonality in evidential rules would be a step towards this goal.

Further, a common set of evidential rules could reduce forum shopping. In the opinion of the writer, this would help achieve a more integrated system because one of its important quality is ensuring the consistency of judgments. Similar disputes should be subject to the same treatment, ensuring consistency of judgment. Judge E of ITLOS has expressed that forum shopping would not be desirable, and that the

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<sup>67</sup> This is linked to the clarity of rules which has been addressed in Chapter 7, Section 4.1.1, 265-266

<sup>68</sup> See: Appendix E.

result of the disputes should not turn on technical rules. The writer agrees with this view. The substance of the case should be the determining factor before a tribunal, and not the procedure through which the dispute is put through<sup>69</sup>.

## 4.2 The disadvantages:

### 4.2.1 Commonality does not take into account the specializations and the nature of the tribunals:

Common evidential rules do not take into account the need of tribunals in two ways. First, as expressed by the judges interviewed, many of the tribunals were created to resolve disputes of specialized subject matter. For example, ITLOS's jurisdiction covers issues arising from UNCLOS, i.e. the law of the sea. The WTO DSB deals with disputes under the WTO Agreement regarding trade. Outside the scope of this study but illustrative are the criminal courts such as the International Criminal Court and the International Criminal Tribunal for the former Yugoslavia. Their specialization requires different evidential rules. For example, the standard of proof in criminal courts is usually higher (beyond reasonable doubt) than in civil cases. Further, urgent cases such as prompt release cases (specific to ITLOS) could demand rules to facilitate this. In contrast, full merits cases before the ICJ would merit from the most extensive evidence. Many of the judges interviewed agreed that, if a common set of rules were to be established, then the specialization of the tribunals will have to be taken into account<sup>70</sup>.

Further, some characteristics of international tribunals do not suit common evidential rules. For example, the ICJ, with its universal jurisdiction, demands a more flexible set of rules than a forum such as the WTO DSB which essentially only deals with disputes on barriers to trade. The standard of proof of the ICJ would have to be flexible enough to deal with, on one hand: a) cases concerning serious acts of States such as the *Corfu Channel Case* or criminal type cases such as the recent Genocide Case, and on the other, B) ordinary civil cases including boundary disputes. Another special characteristic of an international tribunal is the appellate system in the WTO DSB which could require different rules from a forum like the ICJ which is final.

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<sup>69</sup> See also: Chapter 7, Section 4.2.3, 272-273

<sup>70</sup> See: Appendix E

#### 4.2.2 The intention of States

An argument against common rules is that it was not the intention of the States which created the tribunals. States intended to create the tribunals as separate entities and not as part of an integrated system, or with a common set of evidential rules. With the current situation where sovereign States make international law, should it not be the case that their intention be followed? If initiatives to establish common evidential rules were taken, would the judges be acting outside their mandate? Must the initiative for common evidential rules be taken by the States who originally drafted the Statutes of the tribunals? These are questions to be answered. Judge D noted that States did not create tribunals in a hierarchical arrangement with common rules. In his opinion, adopting commonality could prove difficult.

#### 4.2.3 Reducing the choice of States

In contrast to the view that international tribunals should function in an integrated system, there is also the argument that tribunals should function independently. This view encourages tribunals to adopt different rules on evidence to increase the choice of States. In other words, forum shopping would be encouraged. Advocates of this model add that the consistency of evidential rules is not important. States should be encouraged to use third party dispute settlement through choice. Every forum applies international law so the State's choice of tribunal should not matter. This was the view of one of the judges from ITLOS<sup>71</sup>. However, when the idea was shared with an ICJ judge, he added that this has been argued perhaps because there have not been many cases before ITLOS and this would be one way to increase their work. Judge A is also of the view that the difference in evidential rules should not be the decisive factor in a case.

Judge F of ITLOS who supports commonality of evidential rules argued that, if States need choice in international tribunals, evidential rules should not be part of it. There are other considerations which can provide such choice.

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<sup>71</sup> See: Appendix E



Panelist M of the WTO expressed his opinion that tribunal choice for States is a good thing. However, he recognizes the problems arising from overlapping jurisdictions, especially in the future. Common evidential rules would reduce the chance of problems arising but not eliminate it completely.

#### 4.2.4 Problems of implementation

There can be difficulties in the implementation of achieving common evidential rules. For example, tribunals could be overloaded with the extra work. There are also other issues that need addressing, such as: a) the best way to achieve commonality, b) which entities will play a role in the process, c) which tribunal is to take the initiative to start the dialogue, d) what will be the characteristics of the dialogue and who will lead it, e) who will finance the processes in achieving commonality. These are important pragmatic questions which need to be answered.

Judges also expressed the desirability of commonality but noted the potential problems in the implementation<sup>72</sup>. Judge H noted that the problem could arise from the question of who will initiate the process to achieve this commonality. Judge J, although in favour of commonality, had concerns on the legal authority of tribunals to change their evidential rules. He added that, for the moment, there is no urgent need to develop common rules, but more appropriately in ten year's time. The tribunals will learn how to approach this issue through experience, and the judges must keep an open mind. In the context of the WTO, although the panelists recognized the benefits of common rules, they also pointed out that only the Members have the power to change the provisions.

#### 4.2.5 Preliminary Conclusion:

Having seen the advantages and the disadvantages of commonality, the writer is of the view that the former outweighs the latter. This is particularly the case because the community of tribunals will increase, and most of the problems foreseen with the lack of commonality will also increase with it. Adopting commonality now could prevent many problems in the future. In light of the ILC's study on the

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<sup>72</sup> E.g. Judge B of the ICJ.

fragmentation of international law suggesting that international law is now a legal system where rules and norms relate to one another, the writer suggests that commonality of evidential rules is appropriate. However, the disadvantages of commonality, and the methods of implementation need to be addressed<sup>73</sup>.

#### 4.3 Judges' views on commonality:

The research has shown that the judges are split on issue of common evidential rules. Many judges oppose the idea of commonality. One judge expressed the view that commonality would reduce the choice of States in terms of different tribunals with rules which could benefit a State's claim. Another judge stated that there is no need to adopt common rules because flexibility should be enough to avoid inconsistency of the case law<sup>74</sup>. Judge I added that, so far, the disadvantages of the lack of common rules have not been unmanageable. He also noted the trend of tribunals towards specialization. The problems of overlapping jurisdiction would not be significant if this trend continues.

Some judges say that the current arrangement on evidential rules does not hinder the tribunals from functioning, but there are benefits to adopting a common approach to evidential rules<sup>75</sup>. Judge I added that if a common approach is established, the rules must not be too strict.

In contrast, there are also many judges who support commonality of evidential rules. Their view is that tribunals should work together in a community<sup>76</sup>. Judge A of the ICJ supports this notion and has given an insight that it has been suggested within the ICJ that different courts should meet to discuss such issues. However, there was disagreement between the judges whether this should be done, so no initiative was taken. Judge H noted that the evidential rules of the different tribunals already resemble each other to an extent, and thinks that commonality should be established as far as it is necessary. He added that there needs to be an exchange of ideas between the tribunals. Judge F stated that, if there are overlapping jurisdictions, then a common set of rules is highly desirable. In his opinion, international tribunals need common evidential rules to the fullest extent possible. Having noted that WTO law is

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<sup>73</sup> See: Chapter 7, Section 4.3-4.5, 274-313

<sup>74</sup> See Appendix E.

<sup>75</sup> E.g. Judge H, see further: Appendix E.

<sup>76</sup> This view is arguably supported by the ILC's study on the fragmentation of international law, International Law Commission, (2006)

in a niche of its own, one panelist however went on to say that the problems arising from overlapping jurisdictions are real. The WTO also applies general international law so there is no reason why it cannot engage in a dialogue on procedural rules.

Although these interviews were carried out after the ILC's study on the fragmentation, they were before the recent *Genocide Case*<sup>77</sup>. The case is significant because it has brought the attention of tribunals, at least the ICJ, to evidential rules. Questions arise as to whether the answers of the judges concerning commonality would have been different in light of this new case. Perhaps they would recognize to a fuller extent the importance of evidential rules.

#### 4.4 The suggested conclusion:

Having seen the advantages and the disadvantages of a move towards commonality of evidential rules, in the opinion of the writer, tribunals should make an effort to achieve it. The advantages outweigh the disadvantages.

As underlined by many judges, the clarity of the rules on evidence is important, and could make litigation more efficient and cost effective. Commonality will also help achieve the advantages mentioned. Further, as the proliferation of international tribunals continues, problems arising from overlapping jurisdictions will be ever more realistic. The writer is of the view that international law is becoming a more integrated system where norms and the relationship between international tribunals must be recognized. This view of international law is arguably supported by the latest study of the International Law Commission on the fragmentation of international law. Having noted the arguments on fragmentation, the study went on to conclude: "International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles."<sup>78</sup>

In adopting commonality, what must be noted is that there are varying degrees at which it can be adopted. In other words, it is a question of how much cross-fertilization of evidential rules there is in between the tribunals. It is a sliding scale with absolute commonality at one end and no commonality on the other. In between these two extremes, there are different levels of commonality of rules. For example,

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<sup>77</sup> *The Genocide Case*, ICJ, 2007. See: Chapter 4, Section 3.3.2.3, 88-89

<sup>78</sup> International Law Commission, (2006) para 1. NB: This study has not been adopted by the ILC as a whole. See generally on the points addressed by the ILC in: Study Group: Analytical study, (2006) esp. para 1-21.

the lowest level of cross-fertilization is perhaps for a tribunal to clarify its own rules and recognize the rules, including the differences, of other tribunals. A higher level of cross-fertilization would be to adopt general guidelines on evidential rules. For example, the tribunals could agree on what the applicable rules are for different types of cases<sup>79</sup>. An even higher level of cross-fertilization could involve tribunals adopting the same approach on specific evidential rules. At the most extreme end would be all tribunals applying common evidential rules. The question is where on this scale the tribunals would be willing to settle.

As for the suggestion of the writer, the level of commonality cannot ignore the disadvantages mentioned. As indicated by judges, the specialization of the tribunals must be taken into account. Consequently, the thesis proposes that at least guiding principles on evidential rules be adopted.

Guiding principles can be adopted through common rules which take into account the nature of the case or the specialization of the tribunals. For example, on the standard of proof, a set of common rules could be made to stipulate the standard applied to different types of cases, with the criteria for using each one. For example, gravest cases, e.g. those of a criminal nature, could use a high standard of proof such as proof beyond reasonable doubt. Other cases could use a lower standard such as the balance of probabilities, and in some exceptional circumstances, provisions could stipulate when the lowest standard of *prima facie* evidence would be used. Through this arrangement, the provisions on the use of the standard of proof would be shared by the tribunals but the special needs of each tribunal would also be recognised<sup>80</sup>.

This set of guiding principles could also recognise the nature of the case. There could be common rules on the types of expert evidence allowed in different types of case, or under what circumstances<sup>81</sup>. Cases involving technical scientific issues could arguably require independent experts more than those where the judges can grasp the issues presented by the parties. Further, taking the example of *amicus curiae* briefs, the common rules on evidence could recognise and reflect that environmental cases also involve interests of non-states and NGOs.

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<sup>79</sup> See: Chapter 7, Section 4.4-4.5, 275-315

<sup>80</sup> However, it must be noted that dividing cases into categories with different standards of proof will be difficult. There will be border-line cases which are difficult to categorize and cases containing many different issues which could require different standards of proof.

<sup>81</sup> In cases where tribunals refuse the request of parties to appoint independent experts, they could be obliged to provide reasons giving more clarity in the proceedings.

Recognizing the specialised nature of international tribunals also means realising that some aspects of evidential rules cannot be the same. Adopting guiding principles would allow common evidential rules to be limited to the extent that is possible. First, there could be cases where two tribunals need to take different approaches on a particular aspect of evidential rules<sup>82</sup>. Further, the provisions of a tribunal might not permit the adoption of some evidential rules. For example, there has been argument within the context of the WTO DSB whether the AB had the authority to adopt rules on the admission of *amicus curiae* briefs. When tribunals are unable to merge towards commonality, this, and its reasons, should be clearly enunciated.

The proposal of the thesis of moving towards a commonality is supported by many of the judges interviewed. Judge H stated that even though the tribunals consider themselves different, they are also similar in the way they function and the tasks they have to perform. The tribunals can learn from one another.

The judges also made several other points worth mentioning. First, several of the judges have stated that, with the current level of references made between the tribunals and the likelihood of this increasing in the future, evidential rules will eventually merge and commonality will be established in any case<sup>83</sup>. However, none of the judges went into the details as to how this might occur or its time frame. Second, Judge E added that the clarity of the rules would be improved if the judges were obliged to explain the way they have arrived at their decision. Third, Judge H stated that although a common set of rules on evidence would be beneficial, it must not be overly complicated as to create new problems for tribunals and States.

In addition, many judges noted that, even though a common set of rules would reduce problems that could arise from overlapping jurisdictions, it could be difficult to achieve in practice. However, suggestions as to how this could be done will be outlined in the following section.

The judges have also indicated that problems arising from the lack of commonality of evidential rules could also be resolved through other means. For example, as suggested by the arbitral tribunal in the *MOX Plant Case*, mutual respect and a sense of comity between the judicial institutions can be the key in avoiding

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<sup>82</sup> Because criminal tribunals and civil tribunals are very different, one judge has suggested that it might be easier to adopt a common approach to evidential rules among the international criminal tribunals because of their similarities.

<sup>83</sup> See: Appendix E

conflicting decisions from two tribunals on the same dispute<sup>84</sup>. Further, tribunals can grant deference to one another through notions such as *res judicata* and *lis pendens*<sup>85</sup>.

Regarding the argument that it was the intention of States to create tribunals as separate entities, the writer argues that the landscape of international litigation has changed must be seen under a new light. On the creation of a tribunal, States often did not take into account other tribunals at the time or those to be established in the future. They did not foresee the increasing interaction between the tribunals. Consequently, in the context of international litigation today, the tribunals should be seen as a community. This coincides with the view of over half of the judges interviewed.

Concerning the argument that choice should be granted to States through different evidential rules, the writer is of the opinion that this should not be the case. The writer shares the view with some of the judges that the result of the dispute should not turn on a procedural technicality but rather the facts of the case. Further, as indicated previously, encouraging different evidential rules in different tribunals could lead to inconsistencies in the jurisprudence of international tribunals. In the long term, this could cause unpredictability and discourage States from using third party litigation.

#### 4.5 Implementation:

Many of the judges have said that there should be an increase in the dialogue between tribunals, both formal and informal. This dialogue will no doubt help to achieve commonality, and the beginning of the establishment of the guiding principles suggested previously. There needs to be a brainstorm between tribunals for the absorbing each other's ideas. Should a tribunal decide to reject the approach of another, at least the reason for it will be clear. To achieve this dialogue, there were many models proposed by judges.

First, Judge F of ITLOS made references to the arrangement between domestic courts. In that context, there is a community of judges from different jurisdictions that meet regularly at meetings and conferences. They can exchange

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<sup>84</sup> *The MOX Plant Case*, Arbitral Tribunal, 2003 para 27-28

<sup>85</sup> See: Reinisch, (2004) esp. 43-50

ideas about how courts in different jurisdictions have adopted solutions to similar problems.

Second, Judge A of the ICJ has made suggestions for a judicial club at the Hague. International tribunals there, and even the local Dutch courts, could get together for a discussion. The chair of the discussion group could rotate each year. However, Judge A is not sure whether the ICJ would be willing to give up the chair of such a meeting for a smaller tribunal such as the ICTY.

Third, one judge suggested that, if direct dialogue was proving too problematic, then it could go through a neutral third party. The judge gave an example as the Institut de Droit International. He noted that there is a role for a neutral academic body such as the Project on International Courts and Tribunals (University College London) to act as the body where the debate could pass through. He added that the International Law Association would perhaps not be suitable because it has many people from commercial arbitration. The dialogue should, for the moment, concentrate on inter-state fora. In addition, he suggested that there is a possibility of NGOs taking part in the debate.

Fourth, several judges stated that the presidents of the tribunals have an important role to play. They have to take the initiative and discuss issues. This is to avoid the problem of trying to involve too many judges. Judge F welcomes the participation of practitioners and academics with hands-on experience of these issues<sup>86</sup>. There were proposals that international tribunals should look to the UN model where there are regular meetings of the agencies with the Secretary-General as the chairman. In the context of international tribunals, the President of the ICJ can perform the role of chairman. However, this process will be slow to start but good for international tribunals as a whole. In addition, it could eventually be required anyway. Judge D added that this approach is a good idea. However, there are political issues which need addressing before it can be done. The participation of the ICJ would depend on the personality of its President. In his opinion, the dialogue between the tribunals could make some ICJ judges feel threatened. They do not see the need for many tribunals performing similar functions.

Fifth, Panelist K of the WTO suggested that the best way to achieve common rules would be to draft up a list of “best practices” of the different tribunals on

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<sup>86</sup> Judge F added that there needs to be more participation from developing countries because the debate on international law at the moment is mainly made by the Europeans and the Americans.

different aspects of evidential rules. The tribunals can refer to this list when they come across a particular problem. He also indicated that perhaps the ICJ should take an initiative on this, and the rules can then be passed down to smaller tribunals such as the WTO DSB.

If dialogue between the tribunals is proving too hard to achieve at this moment, Judge A suggested that an in-house debate on these issues would be a good starting point.

In addition to what was mentioned above, there are other ways to help achieve a level of commonality. First, in the context of the WTO DSB, to achieve a more collegiate atmosphere, Panelist M has suggested that the members of the panels should be permanent. A permanent body would also work much faster than a temporary one. Second, tribunals should be encouraged to refer to each other's practice and decisions when it is appropriate.

However, adopting commonality is not without problems. The judges indicated that there could be other difficulties in trying to achieve dialogue between the tribunals. Judge C of the ICJ commented that, even though there are certainly benefits to adopting a common approach to evidential rules, tribunals might have difficulty agreeing. Judge H noted that the importance of this issue is yet to be recognised by tribunals. There is no immediate need to address it, and it might take too much of their resources. However, he added that, it should be done if it can be done. This view was also expressed by WTO Panelists. This difficulty can be overcome by promoting the awareness of the tribunals on this issue.

Another problem already briefly touched on is the ability of the tribunals to change its evidential rules in an attempt to pursue commonality. There are questions whether changing the rules or taking a new approach on evidential rules without the consent of States would be *ultra vires*. This thesis will only raise the questions, and the answer is yet to be determined. In some contexts, it has been argued that only States have the authority to alter the procedural rules<sup>87</sup>. However, would tribunals be acting *ultra vires* if only guidelines to the practice were established?

There were several judges of ITLOS who expressed the opinion that, with the amount of references that is currently happening today and the tendency for it to

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<sup>87</sup> See: Chapter 5, Section 5, 160-175



increase, the evidential rules of the different tribunals will eventually merge in any case.

Taking into account the input of all the judges, in the opinion of the writer, the best way to achieve a dialogue between the tribunals and a level of commonality on evidential rules is through a gradual process and the awareness of the tribunals on evidential issues and what the approach of other tribunals are<sup>88</sup>. First, there has to be discussion among the judges within each tribunal. Further, the ICJ should take an active role in leading the initiative to address the question of commonality of evidential rules. Being the only international tribunal that is a primary organ of the United Nations, its role should extend to aiding the development of international law, both substantive and procedural. This role of the ICJ has long been suggested by Sir Robert Jennings: “[The ICJ] is readily and generally thought of as being well suited to the settlement of disputes. But in so doing, it has also a vital role in the development and elaboration of general law.”<sup>89</sup> From the suggestion of judges, the most ideal situation would be where, based on the practice of the specialised agencies of the UN, the presidents of the tribunals meet regularly and the President of the ICJ acting as the chairman. However, this arrangement would require a lot of effort from all tribunals making this goal difficult to achieve. The more realistic model, and one which would not require too much resources, is the judicial club. For example, a club could begin with the tribunals based in the Hague, and expanding to other tribunals in Europe, and the next step would be to other tribunals in other regions of the world such as the Inter-American Court of Human Rights or the Court of Justice of the Common Market for Eastern and Southern Africa. The club would act as a forum where judges and administrative staff could exchange views.

Once there is a dialogue between the tribunals, any points agreed or addressed on commonality can be summarised in a written format of a “Guiding Principles” for all the judges of the participating tribunals. They will then have a point of reference with regards to the direction of any rules of evidence that they may need to adopt. Once the number of participating tribunals increases, or when there is better collaboration between the tribunals, then a more formal and detailed Guiding

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<sup>88</sup> This was also suggested by one of the Judges of ITLOS. One alternative way to see what rules could be suitable for tribunals to adopt is to examine what rules are used by States in *ad hoc* arbitrations because it could indicate their preferred rules. However, there is yet to be a fixed or standard set of rules under such circumstances.

<sup>89</sup> Statement of Judge Sir Robert Jennings, President of the International Court of Justice, read by the Registrar of the Court to the plenary session of the UN Conference on Environment and Development (June 11, 1992), reprinted as *The Role of the International Court of Justice in the Development of International Environment Protection Law*, 1 RECIEL 240 (1993)

Principles could be produced to lay out rules agreed by the different tribunals. This document could be revised according to the needs of new participating tribunals later joining the dialogue.

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Year	Abbreviation	Full Reference
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1980	<i>The Tehran Hostages Case</i> , ICJ, 1980	<i>United States Diplomatic and Consular Staff in Tehran (United States v. Iran)</i> , ICJ Reports 1980, 3 (1980)
1982	<i>Tunisia V. Libyan Arab Jamahiriya</i> , ICJ, 1982	<i>Case Concerning the Continental Shelf (Tunisia V. Libyan Arab Jamahiriya)</i> , ICJ Reports 1982, 18 (1982).
1984	<i>Gulf of Maine Case</i> , ICJ, 1984	<i>Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/united States of America)</i> , ICJ Reports 1984 (1984).
1985	<i>Application for Revision and Interpretation of the Judgment of February 24, 1982</i> , ICJ, 1985	<i>Application for Revision and Interpretation of the Judgment of February 24, 1982 in the Case Concerning the Continental Shelf (Tunisia V. Libyan Arab Jamahiriya)</i> , (1985).
1985	<i>Libyan Arab Jamahiriya V. Malta</i> , ICJ, 1985	<i>Case Concerning the Continental Shelf (Libyan Arab Jamahiriya V. Malta)</i> , ICJ Reports 1985, 13 (1985).
1986	<i>The Nicaragua Case</i> , ICJ, 1986	<i>Military and Paramilitary Activities in and Against Nicaragua (Nicaragua V. United States of America)</i> , Merits., ICJ Reports 1986 (1986).
1986	<i>Burkina Faso V. Republic of Mali</i> , ICJ, 1986	<i>Case Concerning the Frontier Dispute (Burkina Faso V. Republic of Mali)</i> , ICJ Reports 1986, 554 (1986).
1987	<i>Review of Judgment No. 33 Application</i> , ICJ, 1987	<i>Application for Review of Judgment No. 333 of United Nations Administrative Tribunal</i> , ICJ Reports 1987, 18 (1987).
1988	<i>Applicability of the Obligation to Arbitrate under Section 21</i> , ICJ, 1988	<i>Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947</i> , ICJ Reports 1988, 12 (1988).
1988	<i>Case Concerning Border and Transborder Armed Actions</i> , ICJ, 1988	<i>Case Concerning Border and Transborder Armed Actions (Nicaragua V Honduras)</i> , ICJ Reports 1988, 69 (1988).
1989	<i>The ELSI Case</i> , ICJ, 1989	<i>Elettronica Sicula S.p.a. (ELSI) (United States of America V. Italy)</i> , ICJ Reports 1989, 15 (1989).
1989	<i>Aerial Incident of 3 July 1988</i> , ICJ, 1989	<i>Aerial Incident of 3 July 1988 (Islamic Republic of Iran V United States of America)</i> , ICJ Reports 1989, 133 (1989).
1990	<i>El Salvador V. Honduras</i> , ICJ, 1990	<i>Land, Island and Maritime Frontier Dispute (El Salvador V. Honduras)</i> , ICJ Reports 1990, 92 (1990).

1991	<i>Case Concerning the Arbitral Award of 31 July 1989</i> , ICJ, 1991	<i>Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau V Senegal)</i> , ICJ Reports 1991 (1991).
1992	<i>El Salvador V. Honduras</i> , ICJ, 1992	<i>Land, Island and Maritime Frontier Dispute (El Salvador V. Honduras)</i> , ICJ Reports 1992, 351 (1992).
1992	<i>Case Concerning General Phosphate Lands in Nauru</i> , ICJ, 1992	<i>Certain Phosphate Lands in Nauru (Nauru V. Australia)</i> , ICJ Reports 1992, 240 (1992).
1993	<i>Genocide Case</i> , ICJ, 1993	<i>Case Concerning Application of Convention on Prevention and Punishment of Crime of Genocide (Bosnia, Herzegovina V. Yugoslavia (Serbia and Montenegro))</i> , ICJ Reports 1993, 325 (1993).
1993	<i>Greenland and Jan Mayen Case</i> , ICJ, 1993	<i>Case Concerning Maritime Delimitation in the Area Between Greenland and Janmayen (Denmark V Norway)</i> , ICJ Reports 1993 (1993).
1994	<i>Libya V. Chad</i> , ICJ, 1994	<i>Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya V. Chad)</i> , ICJ Reports 1994 (1994).
1995	<i>Qatar V. Bahrain</i> , ICJ, 1995	<i>Case Concerning Maritime Delimitation (Qatar V. Bahrain)(jurisdiction and Admissibility)</i> , ICJ Reports 1995, 6 (1995).
1995	<i>Request for an Examination of Situation in Accordance with Paragraph 63</i> , ICJ, 1995	<i>Request for an Examination of Situation in Accordance With Paragraph 63 of Court's Judgment of 20 December 1974 in Nuclear Tests (New Zealand V. France) Case</i> , ICJ Reports 1995, 288 (1995).
1995	<i>East Timor Case</i> , ICJ, 1995	<i>Case Concerning East Timor (Portugal V Australia)</i> , ICJ Reports 1995, 90 (1995).
1996	<i>Cameroon v. Nigeria</i> , ICJ, 1996	<i>Case Concerning Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon V. Nigeria)</i> , ICJ Reports 1996, 13 (1996).
1996	<i>Legality of the Use By a State of Nuclear Weapons in Armed Conflict</i> , ICJ, 1996	<i>Legality of the Use By a State of Nuclear Weapons in Armed Conflict</i> , (1996).
1997	<i>Gabcikovo-Nagymaros Project Case</i> , ICJ, 1997	<i>Gabcíkovo-Nagymaros (Hungary V. Slovakia) Case</i> , ICJ Reports 1997, 7 (1997).
1998	<i>Fisheries Jurisdiction</i> , ICJ, 1998	<i>Fisheries Jurisdiction (Spain V. Canada) Jurisdiction of the Court</i> , ICJ Reports 1998, 432 (1998).
1998	<i>Lockerbie Case</i> , ICJ, 1998	<i>Question of the Interpretation and Application of the 1971 Montreal</i>

		<i>Convention Arising From the Aerial Incident at Lockerbie (Libya Arab Jamahiriya V Uk; Libya Arab Jamahiriya V USA)</i> , ICJ Reports 1998 (1998).
1998	<i>The Breard Case</i> , ICJ, 1998	<i>Vienna Convention on Consular Relations (Paraguay V USA)</i> , ICJ Reports 1998 (1998).
1999	<i>Case Concerning Kasikili/Sedudu Island</i> , ICJ, 1999	<i>Case Concerning Kasikili/sedudu Island (Botswana V Namibia)</i> , ICJ Reports 1999 (1999).
2000	<i>Aerial Incident of 10 August 1999</i> , ICJ, 2000	<i>Aerial Incident of 10 August 1999 (Pakistan V India)</i> , ICJ Reports 2000, 12 (2000).
2001	<i>Case Concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan</i> , ICJ, 2001.	<i>Case Concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia V. Malaysia)</i> , ICJ Reports 2001, 575 (2001).
2001	<i>Qatar v Bahrain</i> , ICJ, 2001	<i>Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar V. Bahrain)</i> , ICJ Reports 2001, 40 (2001).
2001	<i>LaGrand Case</i> , ICJ, 2001	<i>Lagrand Case (Germany V United States of America)</i> , ICJ Reports 2001, 466 (2001).
2003	<i>Oil Platforms Case</i> , ICJ, 2003	<i>Case Concerning Oil Platforms (Islamic Republic of Iran V. United States of America)</i> , ICJ Reports 2003, 1 (2003).
2004	<i>Wall Case</i> , ICJ, 2004	<i>Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory</i> , ICJ Reports 2004, 136 (2004).
2004	<i>Legality of Use of Force</i> , ICJ, 2004	<i>Legality of Use of Force (Serbia and Montenegro V. France)</i> , ICJ Reports 1999, 198 (2004).
2005	<i>DRC v Uganda</i> , ICJ, 2005	<i>Armed Activities on the Territory of Congo (DRC V. Uganda)</i> , ICJ Reports 2005, 1 (2005).
2006	<i>The Pulp Mills Case</i> , ICJ, 2006	<i>Pulp Mills on the River Uruguay (Argentina V. Uruguay)</i> , (2006).

ITLOS:

Year	Abbreviation	Full Reference
1997	<i>The Saiga Case</i> , ITLOS, 1997	<i>The M/v "Saiga" Case (Saint Vincent and the Grenadines V. Guinea)</i> , (1997).
1999	<i>The Saiga Case (No. 2)</i> , ITLOS, 1999	<i>The M/v "Saiga" (No. 2) Case (Saint Vincent and the Grenadines V. Guinea)</i> , (1999).
1999	<i>The Southern</i>	<i>The Southern Bluefin Tuna Cases (New</i>

	<i>Bluefin Tuna Cases</i> , ITLOS, 1999	<i>Zealand V. Japan; Australia V. Japan</i> ), (1999).
2000	<i>The Monte Confurco Case</i> , ITLOS, 2000	<i>The "Monte Confurco" Case (Seychelles V. France)</i> , (2000).
2000	<i>The Camouco Case</i> , ITLOS, 2000	<i>The "Camouco" Case (Panama V. France)</i> , (2000).
2001	<i>The Grand Prince Case</i> , ITLOS, 2001	<i>The "Grand Prince" Case (Belize V. France)</i> , (2001).
2001	<i>The MOX Plant Case</i> , ITLOS, 2001	<i>The Mox Plant Case (Ireland V. United Kingdom)</i> , (2001).
2001	<i>The Chaisiri Reefer 2</i> , ITLOS, 2001	<i>The "Chaisiri Reefer 2" Case (Panama V. Yemen)</i> , (2001).
2002	<i>The Volga Case</i> , ITLOS, 2002	<i>The "Volga" Case (Russian Federation V. Australia)</i> , (2002).
2003	<i>Straits of Johor Case</i> , ITLOS, 2003	<i>Case Concerning Land Reclamation By Singapore in and Around the Straits of Johor (Malaysia V. Singapore)</i> , (2003).
2004	<i>The Juno Trader Case</i> , ITLOS, 2004	<i>The "Juno Trader" Case (Saint Vincent and the Grenadines V. Guinea-Bissau)</i> , (2004).

WTO DSB:

<b>Year</b>	<b>Abbreviation</b>	<b>Full Reference</b>
1996	<i>Japan - Alcohol Case</i> , WTO DSB, 1996	<i>Japan - Taxes on Alcoholic Beverages Case</i> , 10/11 WT/DS8/11, 11/8 (1996).
1996	<i>USA - Gasoline Case</i> , WTO DSB, 1996	<i>USA - Standards for Reformulated and Conventional Gasoline Case</i> , WT/DS2/9 (1996).
1997	<i>USA - Shirts and Blouses Case</i> , WTO DSB, 1997	<i>USA - Shirts and Blouses Case</i> , WT/DS33 (1997).
1997	<i>USA - Underwear Case</i> , WTO DSB, 1997	<i>USA - Restrictions on Imports of Cotton and Man-Made Fibre Underwear Case</i> , WT/DS24/R (1997).
1997	<i>Canada - Periodicals Case</i> , WTO DSB, 1997	<i>Canada - Certain Measures Concerning Periodicals Case</i> , WT/DS31/R (1997).
1997	<i>EC - Hormones Case</i> , WTO DSB, 1997	<i>EC - Measures Concerning Meat and Meat Products (Hormones) Case</i> , WT/DS26 (1997).

1997	<i>EC-Bananas, WTO DSB, 1997</i>	<i>EC - Regime for the Importation, Sale and Distribution of Bananas, WT/DS27 (1997).</i>
1997	<i>Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, WTO DSB, 1997</i>	<i>Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, WT/DS56 (1997).</i>
1997	<i>India-Patent Case, WTO DSB, 1997</i>	<i>India-Patent Protection for Pharmaceutical and Agricultural Chemical Products Case, WT/DS50 (1997).</i>
1998	<i>Korea - Taxes on Alcoholic Beverages Case, WTO DSB, 1998</i>	<i>Korea - Taxes on Alcoholic Beverages Case, WT/DS75 (1998).</i>
1998	<i>USA - Certain Shrimp and Shrimp Products Case, WTO DSB, 1998</i>	<i>USA - Import Prohibition of Certain Shrimp and Shrimp Products Case, WT/DS58 (1998).</i>
1998	<i>Australia-Salmon, WTO DSB, 1998</i>	<i>Australia-Measures Affecting the Importation of Salmon, WT/DS18 (1998).</i>
1999	<i>Japan - Agricultural Products Case, WTO DSB, 1999</i>	<i>Japan - Measures Affecting Agricultural Products Case, WT/DS76 (1999).</i>
1999	<i>India - Quantitative Restrictions Case, WTO DSB, 1999</i>	<i>India - Quantitative Restrictions on Imports of Agricultural Textile and Industrial Products Case, WT/DS90 (1999).</i>
1999	<i>Canada-Civilian Aircraft, WTO DSB, 1999</i>	<i>Canada-Measures Affecting the Export of Civilian Aircraft, WT/DS70 (1999).</i>
1999	<i>USA - Lead Bars Case, WTO DSB, 1999</i>	<i>USA - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom Case, WT/DS138 (1999).</i>
1999	<i>Turkey-Textiles, WTO DSB, 1999</i>	<i>Turkey-Restrictions on Imports of Textile and Clothing Products, WT/DS34 (1999).</i>
2000	<i>USA - Anti-Dumping Act Case, WTO DSB, 2000</i>	<i>USA - Anti-Dumping Act of 1916 Case, WT/DS136 (2000).</i>
2000	<i>Korea - Dairy Safeguards Case, WTO DSB, 2000</i>	<i>Korea - Dairy Safeguards Case, WT/DS98 (2000).</i>
2000	<i>USA - Copyright Act Case, WTO DSB, 2000</i>	<i>United States-Section 110(5) of the Us Copyright Act Case, WT/DS160 (2000).</i>

2000	<i>Argentina - Footwear, WTO DSB, 2000</i>	<i>Argentina - Safeguard Measures on Imports of Footwear, WT/DS121 (2000).</i>
2000	<i>Australia-Leather, Article 21.5, WTO DSB, 2000</i>	<i>Australia-Subsidies Provided to Producers and Exporters of Automotive Leather, Article 21.5, WT/DS126 (2000).</i>
2000	<i>Australia-Salmon, Article 21.5 Case, WTO DSB, 2000</i>	<i>Australia-Measures Affecting Importation of Salmon, Article 21.5 Case, WT/DS18/RW (2000).</i>
2000	<i>USA - Wheat Gluten Safeguards, WTO DSB, 2000</i>	<i>USA - Definitive Safeguard Measures on Imports of Wheat Gluten From the European Communities, WT/DS166 (2000).</i>
2000	<i>EC-Bed Linen, WTO DSB, 2000</i>	<i>EC - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India, WT/DS141 (2000).</i>
2001	<i>Thailand - Anti - Dumping Duties Case, WTO DSB, 2001</i>	<i>Thailand - Anti-Dumping Duties on Angles, Shapes and Sections of Iron Or Non-Alloy Steel and H-Beams From Poland Case, WT/DS122 (2001).</i>
2001	<i>EC - Asbestos Case, WTO DSB, 2001</i>	<i>European Communities - Measures Affecting Asbestos and Products Containing Asbestos Case, WT/DS135 (2001).</i>
2001	<i>USA - Section 211, WTO DSB, 2001</i>	<i>USA - Section 211 Ominbus Appropriations Act of 1998, WT/DS176 (2001).</i>
2001	<i>India-Autos, WTO DSB, 2001</i>	<i>India-Measures Affecting the Automotive Sector, WT/DS175 WT/DS146 (2001).</i>
2002	<i>Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products Case, WTO DSB, 2002</i>	<i>Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products Case, WT/DS113 (2002).</i>
2002	<i>EC-Sardines Case, WTO DSB, 2002</i>	<i>EC - Trade Descriptions of Sardines Case, WT/DS231 (2002).</i>
2002	<i>Canada-Aircraft II, WTO DSB, 2002</i>	<i>Canada-Export Credits and Loan Guarantees for Regional Aircraft, WT/DS222 (2002).</i>
2003	<i>Japan-Apples, WTO DSB, 2003</i>	<i>Japan-Measures Affecting the Importation of Apples, WT/DS245 (2003).</i>
2003	<i>EC - Pipe Fittings, WTO DSB, 2003</i>	<i>EC - Anti-Dumping Duties on Malleable Cast Iron Tube Or Pipe Fittings From Brazil, WT/DS219 (2003).</i>



2004	<i>USA - Lumber CVDs Final Case, WTO DSB, 2004</i>	<i>USA - Final Countervailing Duty Determination With Respect to Certain Softwood Lumber From Canada Case, WT/DS257 (2004).</i>
2004	<i>USA - Lumber ITC Investigation Case, WTO DSB, 2004</i>	<i>USA - Investigation of the International Trade Commission in Softwood Lumber From Canada Case, WT/DS277 (2004).</i>
2005	<i>USA - Subsidies on Upland Cotton Case, WTO DSB, 2005</i>	<i>USA - Subsidies on Upland Cotton Case, WT/DS267 (2005).</i>
2005	<i>USA - Gambling and Betting Services Case, WTO DSB, 2005</i>	<i>USA - Measures Affecting the Cross-Border Supply of Gambling and Betting Services Case, WT/DS285 (2005).</i>
2005	<i>Dominican Republic - Cigarettes Case, WTO DSB, 2005</i>	<i>Dominican Republic - Measures Affecting the Importation and Internal Sale of Cigarettes Case, WT/DS302 (2005).</i>
2005	<i>EC-Trademarks/GIs, WTO DSB, 2005</i>	<i>EC - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, WT/DS290 (2005).</i>
2005	<i>EC-Chicken Classification Case, WTO DSB, 2005</i>	<i>EC - Customs Classification of Frozen Boneless Chicken Cuts Case, WT/DS269 (2005).</i>
2005	<i>EC - Sugars Case, WTO DSB, 2005</i>	<i>EC - Export Subsidies on Sugar Case, WT/DS265,266,283 (2005).</i>
2006	<i>Mexico-Soft Drinks Case, WTO DSB, 2006</i>	<i>Mexico-Tax Measures on Soft Drinks and Other Beverages Case, WT/DS308 (2006).</i>
2006	<i>USA - "Zeroing" Case, WTO DSB, 2006</i>	<i>USA - Laws, Regulations and Methodology for Calculating Dumping Margins ("zeroing") Case, WT/DS294 (2006).</i>

Iran-US Claims Tribunal:

<b>Year</b>	<b>Abbreviation</b>	<b>Full Reference</b>
1982	<i>Flexi-Van Case, Iran-US Claims Tribunal, 1982</i>	<i>Flexi-Van Leasing, Inc. V. The Islamic Republic of Iran, Case No. 36, Chamber One, Iran-US Claims Tribunal, 1 Iran-US ClaimsTribunal Reports, 455 (1982).</i>
1982	<i>Case No. 1 (Issue II), Iran-US Claims Tribunal, 1982</i>	<i>Case No. 1 (Issue Ii), Decision No. Dec 8-A1-Ft, Iran-US Claims Tribunal, 1 Iran-US ClaimsTribunal Report, 144 (1982).</i>

1984	<i>Time, Inc. v. Iran</i> , Iran-US Claims Tribunal, 1984	<i>Time, Inc. V. Iran, No. 139-166-2</i> , Iran-US Claims Tribunal, 7 Iran-US Claims Tribunal Report, 8 (1984).
1984	<i>Bendone-Derossi Case</i> , Iran-US Claims Tribunal, 1984	<i>Bendone-Derossi International V. The Government of the Islamic Republic of Iran, Interim Award No. Itm 40-375-1</i> , Iran-US Claims Tribunal, 6 Iran-US Claims Tribunal Report, 130 (1984).
1984	<i>Pereira Associates Case</i> , Iran-US Claims Tribunal, 1984	<i>William L. Pereira Associates, Iran V. Islamic Republic of Iran, Award No. 116-1-3</i> , Iran-US Claims Tribunal, 5 Iran-US Claims Tribunal Report, 230 (1984).
1984	<i>Schering Corporation v. The Islamic Republic of Iran</i> , Iran-US Claims Tribunal, 1984	<i>Schering Corporation V. The Islamic Republic of Iran, Award No. 122-38-1</i> , Iran-US Claims Tribunal, 5 Iran-US Claims Tribunal Report, 374 (1984).
1986	<i>Flour Corporation Case</i> , Iran-US Claims Tribunal, 1986	<i>Flour Corporation V. The Government of the Islamic Republic of Iran, Interim Award No. Itm 62-333-1</i> , Iran-US Claims Tribunal, 11 Iran-US Claims Tribunal Report, 296 (1986).
1986	<i>Oil Field of Texas Case</i> , Iran-US Claims Tribunal, 1986	<i>Oil Field of Texas, Inc. V. Iran, Award No. 258-43-1</i> , Iran-US Claims Tribunal, 12 Iran-US Claims Tribunal Report, 308 (1986).
1987	<i>Sola Tiles Case</i> , Iran-US Claims Tribunal, 1987	<i>Sola Tiles, Inc. V. The Government of the Islamic Republic of Iran, Award No. 298-317-1</i> , Iran-US Claims Tribunal, 14 Iran-US Claims Tribunal Report, 223 (1987).
1988	<i>Lockheed Case</i> , Iran-US Claims Tribunal, 1988	<i>Lockheed Corporation V. The Government of Iran, the Iranian Air Force, Et Al., Award No. 367-829-2</i> , Iran-US Claims Tribunal, 18 Iran-US Claims Tribunal, 292 (1988).
1989	<i>Rockwell Case</i> , Iran-US Claims Tribunal, 1989	<i>Rockwell International Systems, Inc. V. The Government of the Islamic Republic of Iran, Award No. 438-430-1</i> , Iran-US Claims Tribunal, 23 Iran-US Claims Tribunal Report, 150 (1989).

Other Cases:

Year	Abbreviation	Full Reference
1827	<i>The Dowman Case</i> , Domestic Claims Commission (United States), 1827 United States	<i>The Dowman Case</i> , Domestic Claims Commission (United States), Act of March 2 Domestic Claims Commission (United States), 1827

		(Convention, United States and Great Britain, November 13, 1826). National Archives of the United States (1827).
1895	<i>The Fur Seal Arbitration Case</i> , Arbitral Tribunal, 1895	<i>The Fur Seal Arbitration Case (United States V Great Britain)</i> , Arbitral Tribunal, The proceedings (1895).
1900	<i>French Guiana-Brazil Boundary Arbitration</i> , Arbitral Tribunal(SwissFederal Council), 1900Swiss Federal Council	<i>Sentence De Conseil Federal Suisse Dans La Question Des Frontières De La Guyane Francais Et Du Bresil</i> , Arbitral Tribunal(SwissFederal Council), Pasicrisie Internationale : Histoire Documentaire des Arbitrages Internationaux (1902) H. La Fontaine, 570 (1900).
1900	<i>Whaling and Sealing Claims</i> , Arbitral Tribunal, 1900	<i>Whaling and Sealing Claims (Russia V United States)</i> , Arbitral Tribunal, Appendix I, 1903 Proceedings and Awards [1902] Foreign Rel. U.S. (1900).
1903	<i>Venezuela Preferential Case</i> , Arbitral Tribunal, 1903	<i>Venezuela Preferential Case</i> , Arbitral Tribunal, J. Scott (1903).
1908	<i>Honduras and Nicaragua V. Guatemala and El Salvador</i> , CACJ, 1908	<i>Honduras and Nicaragua V. Guatemala and El Salvador</i> , CACJ, Sentencia de la Corte de Justicia Centroamericana en El Juicio Promovido por la Republica de Honduras contra law Republicas de el Salvador y Guatemala Corte de Justica Centroamericana (1908).
1913	<i>Felipe Molina Larios V. Honduras</i> , CACJ, 1913	<i>Felipe Molina Larios V. Honduras</i> , CACJ, 3 1911-1917 Anales de la Corte de Justicia Centroamericana. 7 Vols. San Jose : Tipo-grafia de A. Alsina, 58 (1913).
1926	<i>Parker Case</i> , Mexican-USA GeneralClaims Commission, 1926	<i>Parker Case</i> , Mexican-USA GeneralClaims Commission, 4 RIAA, 39 (1926).
1926	<i>Parker v Mexico</i> , United States-MexicanGeneralClaims Commission, 1926	<i>Parker V Mexico</i> , United States-MexicanGeneralClaims Commission, Docket No. 127 (1926).
1928	<i>War Claims Arbiter</i> , War Claims Arbiter, 1928	<i>War Claims Arbiter</i> , War Claims Arbiter, Administrative Decision No. II Dealing with the Bases of Determining Fair Compensation in Patents Claims Functioning Under the Settlement of War Claims Act of 1928 (1928).
1929	<i>Archuleta Case</i> , United States-	<i>Archuleta Case</i> , United States-MexicanGeneralClaims Commission,

	Mexican General Claims Commission, 1929	September 26 Opinions of Commissioners, 1928, to May 17, 1929 (1929).
1930	Mexican-USA General Claims Commission, 1930	<i>Lillie S. Kling (USA) V. United Mexican States</i> , Mexican-USA General Claims Commission, 4 RIAA (1930).
1931	<i>Lighthouses Arbitration</i> , Arbitral Tribunal, 1931	<i>Lighthouses Arbitration (Affaire Des Phares) (France V. Greece)</i> , <i>Lighthouses Arbitration (Affaire Des Phares) (France V. Greece)</i> , Ordonnances de Procedure et Sentences avec Annexes de Tribunal D'Arbitrage constitue en vertu de Compromis signe a Paris le 15 Juillet 1931 entre la France et la Grece (Affaire des Phares) Protocoles des Seance (1931).
1947	<i>Miller v. Minister of Pensions</i> , King's Bench Division, 1947	<i>Miller V. Minister of Pensions</i> , King's Bench Division, 2 All E. R., 372 (1947).
1951	<i>Bater v. Bater</i> , Court of Appeal, 1951	<i>Bater V. Bater</i> , Court of Appeal, (1951).
1954	<i>Batchelder Claim</i> , Italian-United States Conciliation Commission, 1954	<i>Batchelder Claim</i> , Italian-United States Conciliation Commission, 22 International Law Reports (1954).
1955	<i>X. v. Belgium</i> , European Commission on Human Rights, 1955	<i>Re-Application No. 107/55 (X. V. Belgium)</i> , European Commission on Human Rights, 24 International Law Reports, 367 (1955).
1955	<i>Hepworth</i> , Queen's Bench, 1955	<i>Hepworth</i> , Queen's Bench, 2 Queen's Bench, 600 (1955).
1955	<i>Morelle Ltd v Wakeling</i> , Queen's Bench, 1955	<i>Morelle Ltd V Wakeling</i> , Queen's Bench, 2, 379 (1955).
1957	<i>Hornal v. Neuberger Products Ltd.</i> , Queen's Bench, 1957	<i>Hornal V. Neuberger Products Ltd.</i> , Queen's Bench, 1 Queen's Bench (1957).
1978	<i>Irish Case</i> , European Court of Human Rights, 1978	<i>Ireland V. United Kingdom</i> , European Court of Human Rights, 58 International Law Reports, 264 (1978).
1981	<i>Louis de Merode</i> , World Bank Administrative Tribunal, 1981	<i>Louis De Merode</i> , World Bank Administrative Tribunal, (1981).
1983	<i>Air Canada v. Secretary of State for Trade</i> , House of Lords, 1983	<i>Air Canada V. Secretary of State for Trade</i> , House of Lords, 2 A.C., 394 (1983).
1988	<i>Velasquez Rodriguez Case</i> , Inter-American Court of Human Rights, 1988	<i>Velasquez Rodriguez Case</i> , Inter-American Court of Human Rights, Protecting Human Rights in the Americas T. Buergenthal. R. Norris

		and D. Shelton, 3rd edition (Kehl-Strasbourg-Arlington, 1990), 255 (1988).
1990	<i>Thailand - Cigarette Case</i> , GATT Panel, 1990	<i>Thailand --- Restrictions on Importation of and Internal Taxes on Cigarettes</i> , GATT Panel, BISD 37S/200 (1990).
1998	<i>Pinochet Case</i> , House of Lords, 1998	<i>R. V Bow Street Metropolitan Stipendiary Magistrate Ex P. Pinochet Ugarte</i> , House of Lords, 3 Weekly Law Reports, 1456 (1998).

Statute:

Year	Abbreviation	Full Reference
	<i>French "Code de Procedure Civile"</i> ,	<i>French "Code De Procedure Civile"</i>
	<i>French "Nouveau Code de Procedure Civile"</i> ,	<i>French "Nouveau Code De Procedure Civile"</i> .
1899	<i>The 1899 Hague Convention</i> , 1899	<i>Convention for the Pacific Settlement of International Disputes</i> , 1899.
1907	<i>The 1907 Hague Convention</i> , 1907	<i>Convention for the Pacific Settlement of International Disputes</i> , 1907.
1907	<i>Convention for the Establishment of a Central American Court of Justice</i> , 1907	<i>Convention for the Establishment of a Central American Court of Justice</i> , 1907.
1911	<i>Regulations of the Central American Court of Justice</i> , 1911	<i>Regulations of the Central American Court of Justice</i> , 1911.
1945	<i>ICJ Statute</i> , 1945	<i>Statute of the International Court of Justice</i> , 1945.
1945	<i>UN Charter</i> , 1945	<i>Charter of the United Nations</i> , 1945.
1976	<i>UNCITRAL Rules</i> , 1976	<i>UNCITRAL Rules</i> , 1976.
1978	<i>Rules of Court</i> , 1978	<i>International Court of Justice Rules of Court</i> , 1978.
1982	<i>UNCLOS</i> , 1982	<i>United Nations Convention on the Law of the Sea</i> , 1982.
1982	<i>Statute of ITLOS</i> , 1982	<i>Statute of the International Tribunal for the Law of the Sea</i> , 1982.
1994	<i>Dispute Settlement</i>	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i> , 1994.

	<i>Understanding, 1994</i>	
1994	<i>DSU, 1994</i>	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2 to the WTO Agreement), 1994.</i>
1994	<i>Subsidies and Countervailing Measures Agreement, 1994</i>	<i>Subsidies and Countervailing Measures Agreement, 1994.</i>
1994	<i>SPS Agreement, 1994</i>	<i>The Agreement on the Application of Sanitary and Phytosanitary Measures, 1994.</i>
1994	<i>TBT Agreement, 1994</i>	<i>Agreement on Technical Barriers to Trade, 1994.</i>
1994	<i>Customs Valuation Agreement, 1994</i>	<i>Customs Valuation Agreement, 1994.</i>
1994	<i>Textiles Agreement, 1994</i>	<i>Textiles and Clothing Agreement, 1994.</i>
1996	<i>Rules of conduct, 1996</i>	<i>Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, 1996.</i>
2001	<i>Rules of ITLOS, 2001</i>	<i>International Tribunal for the Law of the Sea: Rules of the Tribunal, 2001.</i>
2005	<i>Appellate Body Working Procedure, 2005</i>	<i>Working Procedures for Appellate Review, 2005.</i>

Others:

<b>Year</b>	<b>Abbreviation</b>	<b>Full Reference</b>
1910	Malloy, Treaties, Conventions, International Acts, Protocols and Agreements Between the United States and Other Powers, 1776-1909. Vols 1 and 2., 1910	Malloy, W. "Treaties, Conventions, International Acts, Protocols and Agreements Between the United States and Other Powers, 1776-1909. Vols 1 and 2.", Washington D.C.: Government Printing Office, 1910.
1916	Scott, The Hague Court Reports, 1916	Scott, J. "The Hague Court Reports.", 1916.
1920	Advisory Committee of Jurists, Proces-Verbaux of Proceedings of the Committee,	Advisory Committee of Jurists. "Proces-Verbaux of Proceedings of the Committee.", Chapter 3, Procedure, Article 11, 1920.

	1920	
1920	Joint Commission, Final Report, Joint Commission, United States and Panama, App. A, Rules of Procedure, adopted March 18, 1913, 1920	Joint Commission, "Final Report, Joint Commission, United States and Panama, App. A, Rules of Procedure, Adopted March 18, 1913.", 1920.
1987	Australian Law Reform Commission, Report on Evidence, 1987	Australian Law Reform Commission, "Report on Evidence." Volume 39, 1987.
1989	Laurin, Recueil Dalloz-Sirey de doctrine, de jurisprudence, et de legislation, 1989	Laurin, Yves. "Recueil Dalloz-Sirey De Doctrine, De Jurisprudence, Et De Legislation.", 341-42. 1989.
1998	Dispute Settlement Body, Minutes of Meeting Held on 6 November 1998, 1998	Dispute Settlement Body, "Minutes of Meeting Held on 6 November 1998.", WT/DSB/M/50, 1998.
2000	Guillaume, Speech to the Sixth Committee of the General Assembly of the United Nations, 2000	Guillaume, G. Speech to the Sixth Committee of the General Assembly of the United Nations, 27/10/2000
2000	Guillaume, The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order, 2000	Guillaume, G. "The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order.", Speech by the President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations, 2000.
2000	Dispute Settlement Body, Minutes of Meeting held on 7 June 2000, 2000	Dispute Settlement Body, "Minutes of Meeting Held on 7 June 2000.", WT/DSB/M/83, 2000.

2001	General Council, Minutes of Meeting held on 22 November 2000, 2001	General Council, "Minutes of Meeting Held on 22 November 2000.", WT/GC/M/60, 2001
2006	International Law Commission, (2006)	International Law Commission, Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law. 2006
2006	Study Group: Analytical study, (2006)	Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law; Analytical study, prepared by the Study Group



# Evidential Rules before International Tribunals: Towards Common Principles?

## Appendix

## Appendix A: Information regarding the interviews:

Bearing in mind the three main questions of the thesis:

1. Is there an emerging common set of rules from the practice of international tribunals?
2. What are the factors affecting the formation of evidential rules?
3. Should there be a common set of evidential rules for international tribunals?

### Purpose of the interviews:

The interviews were conducted with the background that the majority of the information for the thesis coming from the tribunals themselves. In addition to the information from the provisions and the cases, interviews paint a more complete picture of the tribunal's view on evidential rules and commonality.

The purpose of the interviews is two fold. First, the interviews supplement the information that can be gathered from what is published in the public domain. This is particular relevant in answering question one and two. Partly because no comments would be directly attributable, the judges were willing to comment and give insights to questions that would not have otherwise been available. This included the policy of the various tribunals on evidential rules and also what their opinion on the fragmentation of international law from the procedural perspective.

Second, the interviews granted the writer the opportunity to obtain the views of the judges on the proposal of commonality. This is unique to this thesis. The details of the views of the judges on the commonality of evidential rules have not been expressed before.

The questions given to the judges are attached as Appendix B.

### Methodology:

The information in this interview was gathered through a series of questions. The views of the judges have been directly incorporated into the thesis where relevant. There has not been a statistical analysis in anyway.

The judges were interviewed on an anonymous basis. This allowed them to openly reply in ways that would have not otherwise been possible. The writer considered this information to be of higher value than the ability to attribute restricted views to particular judges. No recording was made of the interviews apart from the first one where the interviewer felt that the judge was not at ease. The information was noted by hand thereafter.

### Selection of the judges:

The sample of the judges was neither scientifically selected nor random. Letters were sent to all judges of the ICJ, ITLOS and the members of the WTO AB. A number of letters were sent to WTO Panelists. Interviews were conducted with all judges who replied to the letters. The judges interviewed were varied in terms of their own legal tradition and the country which they came from.

## Appendix B: Interview questions for the judges:

1. For each of the following aspect of evidential rules: a) standard of proof, b) expert evidence, c) amicus curiae, please address the questions of:
  - a. Does your tribunal have a general policy or approach towards the issue?
  - b. Are the current rules and policy satisfactory?
  - c. Do you have any comments on the approach adopted by other tribunals?
2. Thinking back to the three aspects of evidential rules in question one, what factors may have an effect on the approach of your tribunal? How does your tribunal decide what approach to adopt on evidential rules?
3. To what extent does your tribunal seek to develop commonality of approach with other tribunals to evidential rules? Is there an active dialogue between the judges within your tribunal? Is there a dialogue between your tribunal and other tribunals?
4. How do the judges on your tribunal influence the way the tribunal adopts a particular approach to evidential rules?
5. Has the increase in the number of tribunals brought the issue of a common set of evidential rules to the forefront?
6. What do you see as the advantages and disadvantages of a common set of evidential rules, if any?
7. Do the advantages outweigh the disadvantages? In other words, in your view should there be a common set of rules on certain aspects of evidence?
8. From the perspective of the judge, would a common set of rules on evidence be desirable? Why? Why not?
9. Is a common set of rules achievable for international tribunals? What should be done? How should it be done?

## Appendix C: Socialist Law and examples of evidential rules from the municipal context

### 1 Socialist Law

#### 1.1 Historical aspects and characteristics of the Socialist Law tradition:

To an extent, pre-1917 Russia and pre-World War II Rumania, Bulgaria, Albania and those States called “socialist” States were part of the Civil Law family. Up to the Revolution in Russia, and before the end of the Second World War in the other mentioned States, there were also movements against the *jus commune* type of procedure, trying to achieve similar goals as the Civil Law tradition. The 1894 Russian Code of Civil Procedure and the Rumanian Code of 1865 were strongly influenced by the French Civil Code<sup>90</sup>. The Revolution of 1917 had great influence on Russian law, which had been under the czarist tradition. The German and the Austrian Civil Codes were models for the Hungarian Code of 1911, the Yugoslavian Code and the Polish Code.

The way reform took place after the 1917 Revolution was crucial for the development of procedural rules of the Socialist States’ judicial system. For example, the reform attempted to make the judicial process accessible to all. As a result, many technicalities were abolished and there needed to be immediate contact between the parties and judges. Replacing judges of the pre-existing regime with lay judges also lead procedures to becoming oral because they would not otherwise be able to cope with the technical written procedures. Public interest was a priority for these reforms. Scholars have suggested that Socialist Law nations have transformed civil procedure with collective welfare as its aim, or what Franz Klein called a *Wohlfahrtseinrichtung*<sup>91</sup>. The notion of “public interest and welfare” requires the court to take into account factors that a “Western” system would not, or would to a lesser extent. For example, State and community interests play an important role in civil proceedings in Eastern European countries<sup>92</sup>. The courts’ and the State attorney’s role in initiating civil proceedings are much more apparent in a socialist system. They are more “interventionist”.

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<sup>90</sup> See Caenegem, (1987) s. 70-71; Gsovski, (1948) 856; Ionasco, (1970) 105, 108

<sup>91</sup> Klein, (1958) 25, 26, 29 (a lecture given in 1901). See further: Cappelletti and Garth, (1987) 13

<sup>92</sup> See: Cappelletti and Garth, (1987) 15

Further, Socialist Law has moved away from the old rules on the evaluation of evidence, evidence exclusion and witness disqualifications. Instead, the system applies the notion of “objective truth”, which means that the burden is upon the judge to inquire into the facts of the case. Any restriction on the judge preventing him from performing this function is incompatible with the system. There is no distrust in the judiciary unlike in the Civil Law tradition. The requirement that the evidence be evaluated fully and freely does not only protect the right of the litigants, but also the right of the State.

## 2 Some examples from the courtroom

This section will briefly address selected issues of evidential rules as an illustration to give a fuller picture of how they are used in domestic courts.

### 2.1 Judicial interrogation of witnesses

Regarding this aspect of evidential rules, there is a clear difference in the approach of the Common Law tradition, Civil Law tradition and Socialist Law tradition. In the Common Law tradition, the attorneys normally carry out the process of interrogating the witnesses through examination and cross-examination. The judge does not normally exercise his power to question the witnesses. In England, the judge may question a witness to clarify a particular point but not to start a new inquiry, whereas in the United States, the judge has more power even though not broadly exercised. In these countries, the power of the judge is limited because it is argued that, by commencing a line of questioning, the judge might be seen to be biased towards one party.

In the Civil Law and the Socialist Law traditions, the person who usually directs the questioning is the judge. The attorneys may only question the witnesses through the judge or after having been given authority to do so<sup>93</sup>. The view on the Continent is that the judge is impartial so he is in a better position to ask the

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<sup>93</sup> E.g., the French Civil Code of Procedure, Art. 213 and 214. For Germany, see: Kaplan, Mehren, and Schaefer, (1958) 1234-1235

questions. Parties can affect the objectivity of the witness through leading questions. Prior to the French Revolution, the interrogation by the judge was done *in camera*<sup>94</sup>.

However, the distinction between the systems might not be as clear-cut as suggested above. In the Civil Law tradition, there are also limitations on the power of the judge. For example, the judge can only inquire within the limits of the *res in judicium deducta* (the factual allegations of the parties). Hence, the judge cannot call up a witness on his own motion, and has to adhere to the questions submitted by the parties. The judge does not ask his own questions. In the Common Law tradition, the judge may also have a lot of control over the proceedings and the questioning of the witnesses, even without the direct powers to interrogate them.

## 2.2 Ex-Officio Judicial gathering of evidence:

Various legal traditions differ on this aspect of evidential rules. In some Civil Law and Eastern European States, the judge has more power in this regard than his counterpart in the Common Law tradition. For example, the judge in France can order the gathering of evidence *ex officio*, with minor exceptions. In Socialist States, the judge can order any type of evidence to be taken. However, judges in the Common Law tradition generally have less power. Even though the American judge can call witnesses *ex officio*, this power is hardly used in civil proceedings. The English judge may only do so if there are no objections from the parties.

Similar to the issue of the power to interrogate witnesses, the distinctions between the different legal traditions are again not very clear-cut. Civil Law judges are also subject to limitations and their powers are not used often because the parties usually cover most of the issues in the submissions.

## 2.3 Other differences between legal traditions:

There are also further examples of differences that distinguish the legal traditions. The first is judicial notice of foreign law. In the Civil Law jurisdiction, the court is generally capable of determining foreign law. In the Common Law jurisdiction, foreign law is a question of fact for the parties to prove. This is normally

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<sup>94</sup> In today's context, it has been argued that allowing parties to question the witnesses will be effective because they will more familiar with the facts.

the case in England and most other Common Law countries. In the United States, the court is gaining more power to determine the question of foreign law<sup>95</sup>.

The second issue is the judicial control of pre-trial and proceedings. The Civil Law tradition's proceedings are not as concentrated as those in the Common Law systems. In the Civil Law tradition, a pre-trial may not even exist. In the Socialist Law tradition, the preparation for the trial is in the judge's control. This is to be contrasted with the Common Law tradition where the parties have control over the preparation for the trial.

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<sup>95</sup> See further: Cappelletti and Garth, (1987) 29

#### Appendix D: *Australia- Measures Affecting the Importation of Salmon:*

This case between Australia and Canada concerned a measure taken by Australia to restrict the importation of fresh, chilled and frozen salmon from Canada. The restrictive measure was based on the identification by Australia of 24 disease agents that could have been present in Canadian salmon, and consequently a threat to the health of Australian salmon. The measure adopted by Australia prohibited the importation of dead salmon if untreated with heat to eliminate the risk of disease.

Following consultation through the GATT framework, Australia made a risk analysis on non-heated salmon. The final report recommended that salmon importation should not be permitted at that moment. However, the risk analysis was only carried out for one type of salmon, those which were wild and ocean-caught in the Pacific Ocean but not for the other types of salmon produced by Canada<sup>96</sup>.

The panel had to decide whether Australia's measure was consistent with its obligations under the WTO Agreement. Canada argued that the prohibition was inconsistent with: a) Articles XI and XIII of the GATT<sup>97</sup>, b) Article 2, 3, and 5 of the SPS Agreement<sup>98</sup> and, c) nullifies or impairs benefits under the WTO Agreement.

In the Report, the panel ruled, *inter alia*, that: a) because Australia did not carry out risk assessment on other types of salmon, the measure did not satisfy Article 5.1 of the SPS Agreement<sup>99</sup>, b) Australia imposed stricter measures for salmon than for herring or finfish<sup>100</sup>.

Again in this case, the panel decided to seek advice from experts<sup>101</sup>, and consulted the parties before hand. The parties did not request the panel to seek the advice but also had no objection. A list of experts was sought from the International Office for Epizootics. The parties were invited to submit names of experts and given the opportunity to comment on each expert. The panel chose experts in three fields: fish diseases, the procedures of the International Office for Epizootics, and general risk assessment procedures<sup>102</sup>.

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<sup>96</sup> There were four other categories of salmon which were differentiated by the way they were raised and caught.

<sup>97</sup> Article XI concerns the general elimination of quantitative restrictions. Article XIII concerns the Non-discriminatory administration of quantitative restrictions.

<sup>98</sup> Article 2 concerns the basic rights and obligations, article 3 Harmonization, and article 5 the assessment of risk and determination of the appropriate level of sanitary or phytosanitary protection.

<sup>99</sup> *Australia-Salmon*, WTO DSB, 1998 Panel Report, para 8.59 and 8.96-99

<sup>100</sup> *Australia-Salmon*, WTO DSB, 1998 Panel Report, para 8.134-141. The panel ruled that this distinction render the measure to be "arbitrary and unjustifiable".

<sup>101</sup> Based on article 13(1), (2) of the DSU, and article 11(2) of the SPS Agreement.

<sup>102</sup> *Australia-Salmon*, WTO DSB, 1998 Panel Report, para 6.3



Similar to the previous case, the panel prepared questions in consultation with the parties and submitted them to the experts individually. The experts were asked to provide their responses in writing to the questions that they felt qualified to address<sup>103</sup>. The experts were provided with the written submissions of the parties and the written version of the oral proceedings. This dispute involved four experts. The questions covered a range of issues including Australia's risk assessment procedures, the relevance of the risk assessments of other States, and the details of how the disease from Canadian fish could potentially be transferred to Australian fish. A detailed summary of the responses of the experts was also found in the Panel Report<sup>104</sup>.

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<sup>103</sup> *Australia-Salmon*, WTO DSB, 1998 Panel Report, para 6.4

<sup>104</sup> *Australia-Salmon*, WTO DSB, 1998 Panel Report, para 6.1-6.157

	Q1: Is there a general policy towards the issues? Current rules satisfactory?; Comments on the approach of other tribunals?	Q2: What factors affect the approach of your tribunal?; How does your tribunal decide what approach to adopt?	Q3: The extent the tribunal seeks to develop commonality with other tribunals?; Is there a dialogue between the judges or tribunals?	Q4: How do the judges influence the way in which the tribunal adopts an approach to evidential rules?
<b>Judge A (ICJ)</b>	<p>SP: - No general policy. Not satisfactory. On occasion, the Ct has mentioned standards, e.g. Corfu Channel. Continental judges not sure how to deal this issue.</p> <p>- The most serious act requires a high standard, similar to criminal standard. Hard to determine seriousness, only case-by-case.</p> <p>Ex: No general policy. Some cases, oral evidence not that useful. Written expert evidence tends to be ok. The use of affidavits mentioned in Ct. Opinion: Ct. feels that it is too Anglo-Saxon.</p> <p>AC: Not big issue here. Position is quite closed. Ct. has discussed it once or twice.</p>	<p>- The judges play an important role. Some like to express their opinions, some don't. I am in the middle.</p>	<p>- No effort made to bring tribunals together so far. Why have we not had seminars on this? No dialogue so far.</p> <p>- ICJ don't look at other courts. Feeling: we are the big brother, almost a defensive arrogance. Some judges think the big brother approach is apparent from the big budget.</p> <p>- On occasion, I tried to look at other tribunals, but this was frowned upon by some judges.</p> <p>- ICTY is really the only one we can look at now.</p> <p>- The President is key.</p>	<p>- Civil/Common law divide.</p> <p>- There are some common law judges who stick to their common law notions.</p> <p>- Apparent in the style of writing: e.g. Congo/Uganda was written by common lawyer.</p> <p>- All judges contribute to the judgment.</p>
<b>Judge B (ICJ)</b>	<p>SP: I have always advocated for showing a clear standard. There was a problem in the Oil Platforms – standard not clear. Majority of the Ct. goes for conviction intime approach.</p> <p>- We avoided setting the standard in Congo v Uganda by just stating what has probative value.</p> <p>- We will need to revisit this issue.</p> <p>- Opinion: a high standard for a serious case. But not sure for other judges.</p> <p>- Serious cases include: major uses of force, breaches of humanitarian law.</p> <p>- I have not succeeded in spelling out a precise standard. The approach of Congo v Uganda is probably the way for the future.</p> <p>Ex: Written expert evidence satisfactory. Experts can also be called.</p> <p>AC: Generally opening up, also the case with other tribunals. Key is to give chance to non-state actors. AC mainly to do with AO. Non-states generally not interested in contentious cases. AC will open but must be consistent with the Statute, as happened in the Wall Case. Long way off AC for contentious cases, but don't think this matters. AC is about representation not presenting information. No need for extra legal argument.</p>	<p>- For the judge, experience at the Bar is important. Those who have been to the Bar can see issues others might not see.</p>	<p>- We do not look at other tribunals a great deal. There are some other tribunals which are very different.</p>	<p>- Civil/Common law divide.</p> <p>- Some judges do not like the cross-examination process.</p>
<b>Judge C (ICJ)</b>	<p>SP: Issue not arisen in a sharp way. The Ct has not been specific. The Ct was careful in Congo v Uganda. There was</p>	<p>- The issue on the law of evidence does not appear that often.</p>	<p>- Don't look at other tribunals much, but there is yet to be a huge</p>	<p>- All background of the judges count, not just the Civil/Common la divide.</p>

Key:

SP: Standard of Proof      Ex: Expert Evidence  
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PoE: Preponderance of Evidence      SBT: Southern Bluefin Tuna  
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	<p>careful thought. The standard shifts with the seriousness of the act, a bit like fraud in Common Law. Cannot pinpoint the precise standard of the Ct. This is because of the many different legal traditions (see Other Comments). Current approach has advantages and disadvantages.</p> <p>Ex: - Ct has power to appoint experts which is sometimes done. Normally, parties appoint them, but the evidence sometimes not satisfactory often with a direct clash. An objective view would be good. Usually up to the parties to request independent experts. Generally up to the parties to present expert evidence.</p> <p>AC: - Ct has not really used this. Problems could arise where the real parties are not before the Ct, a potential problem with the Statute.</p> <p>- The Ct has generally refused AC. AC sometimes benefit the Ct, sometimes not.</p>		<p>amount of practice on this issue. Possibility of looking at the ICTY and ICTR.</p> <p>- But we do look sometimes.</p> <p>- There is some dialogue, on both substantive and procedural issues. There is borrowing from other tribunal's jurisprudence.</p>	<p>The training at the Bar is also important.</p>
<b>Judge D (ITLOS)</b>	<p>- No general policy on evidential rules. The closest in terms of the rules to us is the ICJ. This is probably because the tasks we do are very similar. Not surprising that we have similar rules, but our rules have been changed slightly, tailored for us. We wanted to speed up the process from the ICJ.</p> <p>SP: No general policy on this issue. Some judges have expressed views though. I think we apply the Civil conviction test.</p> <p>Ex: Experts are used in a satisfactory way. Voir dire was used in the SBT Case. Question arose: can experts be counsel and also called up. ITLOS has not used independent experts but informally we have. There is no time. With the chance, we will call independent experts. Personally, I would give more weight to independent experts but party experts have not been biased either.</p> <p>AC: This has been discussed. We follow the approach of the ICJ, but generally with caution. There are non-state interests in cases here. We note the NGO bias in such submissions. Tribunal agree to approach ACs with caution. ITLOS probably follow ICJ: no ACs accepted for contentious cases but only for AO.</p>		<p>- We try to establish commonality with the ICJ.</p> <p>- In addition to the ICJ, we also look at the European Court (non-ICJ tribunals are looked at with caution).</p> <p>- Opinion: tribunals look at one another. Compulsory nature of PM of the ICJ was copied from us.</p> <p>- We look at other tribunals and examine their jurisprudence. But we note that we might be dealing with different things.</p> <p>- There is no formal dialogue between the tribunals, maybe some informal, e.g. President Higgins is coming to visit us.</p>	<p>- There is more influence from the Civil law tradition than the common law tradition.</p>
<b>Judge E (ITLOS)</b>	<p>- No common policy on rules of evidence, like a "black hole". There is a lack of debate on this issue.</p> <p>- ITLOS has no general policy.</p> <p>SP: The standard was not satisfactory in the Saiga Case. Generally, we apply the PoE standard. The standard is different for the merits and the jurisdiction phase. It is higher for the jurisdiction phase: higher than PoE but not quite BRD. The word "satisfied" in the provisions for establishing jurisdiction is more than PoE.</p>	<p>- Everything has an influence: experience of the judge, past practice, behaviour of the Agents, behaviour of the States.</p> <p>Opinion: however, all these factors probably won't play a role on the conscious mind, but at the back of the mind.</p> <p>- The nature of international litigation is adversarial. We rely on the evidence of</p>	<p>- There is no general policy.</p> <p>- There is an active dialogue between the judges of this tribunal but no dialogue between the tribunals.</p> <p>- Judges here try to adopt a common approach on evidence.</p> <p>- We look at the ICJ. But this is sometimes hard because the</p>	<p>- All background of the judge affects the way evidential rules of the tribunal.</p> <p>- We always argue points in deliberations. There is a very active dialogue. If we cannot agree, then we use Dissenting Opinions.</p> <p>- I see some distinction of the Civil/Common law divide. The Common</p>

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	<p>Ex: In the SBT case, experts were very influential. There was no need for independent experts because the party experts had enough expertise. In some cases, such as the Saiga, there was expertise within the tribunal.</p> <p>AC: No opportunity to submit AC so far. If there is an opportunity, we will probably admit AC. ACs can bring in a lot of subjectivity. Have to ask where the brief is from. There will always a hidden agenda, e.g. from NGOs. The judges have to weigh up the different perspectives. ACs don't really make a difference to the result.</p>	<p>the parties. It is for the parties to present the facts. The tribunal will not generally investigate further into the facts.</p> <p>- Limitation of time. We have to be very focused on the issues.</p>	<p>approach of the ICJ is sometimes inconsistent and difficult to follow.</p>	<p>lawyer will look into facts that might be considered as irrelevant. Civil lawyers might more easily see the issues.</p>
<b>Judge F (ITLOS)</b>	<p>- There is no common approach on evidence. Generally, the rules in international fora are not restrictive and with much flexibility.</p> <p>SP: -Lack of clarity. Some members probably apply the BoP test. A limited number apply the BRD test.</p> <p>- We need rules on SP. Are we just trying to please everyone by adopting flexible rules?</p> <p>- States might fear the uncertainty.</p> <p>Ex: - They play a crucial role. If the party experts submit contradicting evidence, then we must have independent experts.</p> <p>- We have not had any because there is yet to be a merits case. Let's see when there are more merits cases.</p> <p>AC: Some members are pro, some are not. Generally, I think we are pro.</p> <p>- The benefits of AC depends on the case. ACs are rare even in domestic cases but they are very good when used correctly.</p>	<p>- Time is big factor, especially in the urgent cases.</p>	<p>- We look at the ICJ. If they set rules, then we are likely to follow.</p> <p>- We can't just use domestic rules.</p> <p>- There is interaction between the judges but only at a personal level.</p> <p>- International judges should look at the domestic level. Domestic judges have meetings and conference. We should have this.</p> <p>- Within this tribunal, there is very good dialogue. We can discuss everything. There is open-ness.</p>	
<b>Judge G (ITLOS)</b>	<p>- There are some principles that are applied generally by tribunals.</p> <p>- Issues on evidence usually arise at the oral stage when a lot of the evidence is produced.</p> <p>- Judges have a lot of flexibility.</p> <p>SP: Depends on the case. Opinion: we don't apply a specific standard as such. Tough to determine in urgent cases.</p> <p>- Try to avoid municipal concepts because it can be misleading. We have to look at specific cases. The parties present to us what is needed.</p> <p>Ex: The use of experts depends on the subject matter.</p> <p>- If the case is very technical, we sometimes need independent experts, but we still don't know how independent they are. But, they tend to give a more complete picture.</p> <p>- Party experts are cross-examined. This is good.</p> <p>AC: Cautious on this issue. Good when used in domestic context, but can be misleading in the international plane.</p> <p>- No need for friends. Just apply law. Too much influence is</p>	<p>- The background of the judge. There are few evidential rules so the judge has to bring in a lot. The geographical location of where the judge comes from is important.</p>	<p>- We apply general principles of law that are applied in other tribunals.</p> <p>- We are aware of what is going on elsewhere.</p> <p>- We must be careful when applying same rules to different matters. Tribunals are different, e.g. prompt release cases here.</p>	<p>- The stance of the judge on particular issues can influence the outcome of the case.</p> <p>- A lot depends on who is judge at the time.</p>

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	<p>not a good thing. ITLOS does not have much time.</p> <p>- Future: if busy, we cannot admit them. But if we are split into chambers on certain issues, they could be used. Hard to use them if full court in session, but might be able to in specific issues such as the environment.</p>			
<b>Judge H (ITLOS)</b>	<p>SP: Nothing in the rules. Depends on the issues and the case. Otherwise, we apply the "well-founded" test, but this exact point is a legal determination. SPs are subjective. The judge will weigh up the evidence, looking at what is most convincing first. He will have to be convinced. There is room for improvement on the current rules but not feasible to formulate a strict policy. Better to adopt aids.</p> <p>Ex: Expert evidence comes from both parties. We have not used independent experts. It all depends on the case: party experts cover most of what is needed in urgent cases. But, we have sought informal independent experts because we could not understand what the parties were saying. If case very technical, we will have to rely on experts. So far, no need yet. There has not been discussion on the lack of rules but we are not hindered by it.</p> <p>AC: AC's purpose is to fill gaps of inadequate information. We have discussed this and concluded that they are desirable within the constraints of the rules. Opinion: no huge problem if we admit them. ACs from NGOs should be ok too.</p> <p>Opinion: ACs will be useful. People can submit them and we can refuse them if we don't want them. There is a risk of getting too many. The cost-effectiveness of litigation must not be undermined. We might also admit briefs from individuals. It's strange if we can ask expert opinion but not accept submissions. Seeking experts is just asking people you know. What if information with people you don't know?</p>	<p>- The legal tradition of the individual judges.</p> <p>- Time and money are factors. The tribunal tries to keep undue delay and cost to a minimum.</p>	<p>- Look at our own practice and that of the ICJ, but we are different in some ways.</p> <p>- There is dialogue within the Tribunal. We discussed the issue of ACs.</p> <p>- No mechanism for inter-tribunal dialogue set up. I have suggested for there to be a dialogue.</p> <p>- There is no informal dialogue between the courts either.</p>	<p>- Different judges might be skeptical of things which he has not seen in his own jurisdiction.</p> <p>- Judge have deliberations. We discuss issues and many drafts of the judgment to see whether we can come to an agreement.</p>
<b>Judge I (ITLOS)</b>	<p>SP: The ICJ and ITLOS have similar cases. There is good reason for the existence of a common set of rules. The WTO is different in nature. ICTY totally different.</p> <p>- SP must take into account the area of law also.</p> <p>- In our urgent cases, we apply a lower standard. The standard is not as strict as the domestic context.</p> <p>Ex: The current arrangement is satisfactory. The international judge is powerless when dealing with sovereign States. We can't go far getting evidence. Everything is left to be done in the cross-examination process. Judges sometimes bow too easily to expert evidence.</p> <p>- There is also the risk that experts are used informally without knowing the extent of the effect they have on the tribunal.</p> <p>- Experts appointed by the court in consultation with the parties are very legitimate, but still need to be checked with</p>	<p>- The different backgrounds of the judges play a role. We muddle through with the different backgrounds.</p> <p>- Opinion: We all find a middle ground. The procedures are not dominated by one tradition, but a mix.</p> <p>- Time limitation, especially in urgent cases. We cannot deal with the evidence properly in that time.</p> <p>- We have urgent cases, and not even the chance to address them at the merits (unlike the ICJ).</p>	<p>- We look at other courts, especially the ICJ. We will take the same approach as them, unless there is good reason not to do so.</p> <p>- There is no dialogue. We look at published cases, and seek commonality unless there is good reason not to.</p> <p>- The WTO is quite different from us and their jurisprudence might not have the same weight.</p>	<p>- If there is a procedure stemming from the common law, we leave it to the common law judges to deal with it.</p>

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	cross-examination. However, there is the time limitation. AC: We are reluctant. Don't think they have a place here. ACs would be too much interference, but this is the conservative view. I think we should open up and welcome them. Non-States' views can be useful on many issues.			
<b>Judge J (ITLOS)</b>	<p>SP: - There are no written rules on this, and no uniform doctrine. But there have been some developments such as comments by judge Wolfrum in his Opinion.</p> <p>- Opinion: On the whole, the majority of the tribunal applies a standard similar to the common law standard, perhaps BRD but this is not explicit.</p> <p>- The ICJ has not said anything explicit either and they have functioned for 60 years.</p> <p>- Flexibility in SP is better than rigid approach. I admit there are some problems with the flexible approach but this can be remedied.</p> <p>Ex: So far, expert evidence has been useful. We have not had independent experts as yet but we have used them informally.</p> <p>- Whether we need more independent experts depends on the problems that arise. It is not easy to find the right experts.</p> <p>- There is a cross-examination process for party experts which is good.</p> <p>- It is not certain whether we will use independent experts in the future.</p> <p>AC: - Our provisions do not allow this. The tribunal has talked about it but without a conclusion. In the past, the attitude of the majority has been cautious. The minority support ACs.</p> <p>- There is the legal hurdle of ACs not being provided for in the provisions.</p> <p>- However, if submitted, judges would likely read ACs. Unlikely for judge to throw things away. Submissions would probably have an effect, e.g. subconsciously.</p>	<p>- We look at the ICJ with respect, but not exclusively.</p> <p>- Time limits is important, especially because we have had many urgent cases.</p> <p>- In the Grand Prince Case, some evidence was rejected because of the lack of time.</p> <p>- If there are cases that we share, we would probably follow the approaches of other courts.</p> <p>- It would be an exception that we take a different route.</p> <p>- The cases are similar, we are likely to go along the same path anyway.</p>	<p>- In broad terms, there is a dialogue between tribunals.</p> <p>- A dialogue has started but it tends to be more general procedural issues, e.g. preliminary objections. E.g. the ICJ looked to us on the question of PM.</p> <p>- There is an echo in the jurisprudence, e.g. the precautionary principle. Opinion: there is an implicit dialogue.</p> <p>- So far, things have been on a personal basis.</p> <p>- We are 21 judges here. It is hard to get everyone to talk to one another.</p> <p>- The lack of cooperation between tribunals partly stems from the politics between the tribunals.</p>	<p>- Civil/Common Law divide is there.</p> <p>- Remember that many judges are legal diplomats. They are not too bothered about technical rules, because they have minimal knowledge of such notions.</p>
<b>Panelist K (WTO DSB)</b>	<p>SP: (Hesitant) The SP applied is <i>prima facie</i> evidence. The claimant has to prove to the panel that it has a <i>prima facie</i> case. The burden then shifts to the defendant. The defendant then has a higher standard to rebut this claim.</p> <p>- But the standard is not that precise as such. It is intuitive for us whether they have strong case.</p> <p>- The SP is perhaps higher for cases involving issues such as fraud, because of the seriousness of the act.</p> <p>Ex: We did not use experts when I was panelist. We thought that there was enough expertise within the panel and the Secretariat. The Secretariat would have a section on anti-dumping. The Panel would also have one or two experts on anti-dumping. If there is not enough expertise, then there</p>		<p>- No dialogue between the panelists and the tribunals on commonality of evidential rules. Not sure about the AB stage where there could be meetings.</p> <p>- There could be meetings between tribunals but we must note that tribunals are different.</p>	<p>- No distinction between Civil/Common Lawyers.</p>

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	<p>would be independent experts appointed, e.g. Beef Hormones Case. Independent experts tend to be appointed in scientific cases. Party expert evidence: we do look at it but the question is how probative are they? We take many factors into account, e.g. who wrote the submission and whether it was done before or after the dispute, the "independence" of the experts.</p> <p>AC: They were widely accepted but generally ignored unless very compelling. Opinion: the open approach is good, allowing the panel choice to accept the AC or not. But the evidence brought by the parties is of higher relevance and quality. NGOs often do not know the real issues. Generally, ACs are good thing.</p> <ul style="list-style-type: none"> <li>- Opinion: ACs don't tilt the balance to 1<sup>st</sup> world States.</li> <li>- Chance that ACs could bring up issues not addressed by parties. Current rules on AC ok.</li> </ul>			
<b>Panelist L (WTO DSB)</b>	<p>SP: - The complainant must establish a prima facie case. The burden then shifts to defendant who needs to prove his case BYD.</p> <ul style="list-style-type: none"> <li>- This was very hard for me to gather as a civil lawyer. I had to look up this in many books. Only the lawyers were concerned about the SP. The issue of SP did not take a lot of time. If there were problems, we can always consult the Secretariat.</li> </ul> <p>Ex: We apply DSU-Art 13. We are very open to the use of experts but none were appointed in the cases that I have been involved in.</p> <ul style="list-style-type: none"> <li>- The Secretariat was able to help if advice is needed on trade issues, but independent help might be needed on scientific issues.</li> <li>- We look at the party submissions but very cautious about what we take into account because they tend to present extreme views.</li> <li>- Current rules on experts are satisfactory because it gives us many options.</li> </ul> <p>AC: Rules on AC are made up by the AB. Nothing precise about this in the DSU. We follow the approach of the AB and consider ACs for a possible use in the case.</p> <ul style="list-style-type: none"> <li>- Panels have to be careful with ACs because they can be biased.</li> <li>- The rules on AC also seem to be a clash of legal cultures. I did not understand it as a civil lawyer.</li> <li>- There must be a balance between flooding the panels with information and making good use of it.</li> <li>- It is hard not to take something into account once it has been read, so I think ACs do influence our judgment.</li> <li>- For the panels which I was in, we applied the criteria of</li> </ul>	<ul style="list-style-type: none"> <li>- The panel meetings are not court-like but rather normal meetings. This makes it easier for experts to give evidence. The court-like arrangement of the ICJ and other courts are very intimidating. More is revealed in the informal context.</li> <li>- The Chair of the Panel is important. He is in control of the proceedings.</li> <li>- I keep in mind the notion of "Good administration of justice". This is hard to define, but to me, it includes notions such as impartiality.</li> <li>- We take into account whether the approach we take will become something of a general application later one.</li> </ul>	<ul style="list-style-type: none"> <li>- We don't really look at other tribunals. We don't look at the rules from the ICJ or ITLOS. We already have our own rules.</li> <li>- The WTO is different. We are special in our own way.</li> <li>- Personally, I do look at some rules of the ICJ, ICSID, UNCITRAL. I look at them in a general context.</li> <li>- No dialogue between the tribunals. The work done is through research.</li> <li>- The Secretariat can play a role in the future in the referring between tribunals. The Secretariat can contact other tribunals.</li> </ul>	<ul style="list-style-type: none"> <li>- The background of the judges makes a difference, especially on issues of interpretation of the rules of the DSU.</li> <li>- Civil/Common Law divide. Different lawyers bring in different backgrounds. We will discuss different views.</li> <li>- The general background of non-lawyer panelists also plays a role.</li> <li>- Non-lawyers don't deal too well with technical issues.</li> </ul>

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	<p>whether that submission was neutral or commercially motivated. We throw away those that were not neutral. We seek the real friends of the court. Once we decide this, we all read the submissions and talk about it.</p> <ul style="list-style-type: none"> <li>- There is the risk of not knowing what is in the submission until you read them. But we cannot read everything.</li> </ul>			
<b>Panelist M (WTO DSB)</b>	<p>SP: I think we apply the BoP test, but on second thought, the civil law notion of the conviction of the judge also applies. We apply the two stage test as well, but I think, overall, it is the conviction test. This is more subjective than the common law standard. It is easy for the claimant to establish <i>prima facie</i> evidence.</p> <ul style="list-style-type: none"> <li>- SP not spelt out because the DSB is about the settlement rather than the adjudication process. We need something clearer and formal.</li> </ul> <p>Ex: - On examination of the experts, the international judge tends to remain silent. They are generally passive unless there are issues concerning impartiality of the experts.</p> <ul style="list-style-type: none"> <li>- Expert evidence can play a very important role in a case.</li> <li>- Evidence presented in reports by the parties was also useful. The DSU is also willing to appoint experts. Party experts tend to support their argument. I prefer independent experts.</li> </ul> <p>AC: I never had them sitting as a panelist. ACs are important in the context of the WTO. There is much advantage in admitting them.</p> <ul style="list-style-type: none"> <li>- Must be careful that we don't admit everything and have to take it on a case by case basis. AC submissions would be sub-ordinate to parties' submissions. Their probative value would also depend on the NGO.</li> </ul>	<ul style="list-style-type: none"> <li>- The nature of the dispute.</li> <li>- The conduct of the parties, including what evidence is brought forward.</li> <li>- What we learn from other tribunals.</li> <li>- Who is chairing the panel.</li> </ul>	<ul style="list-style-type: none"> <li>- No dialogue between the tribunals or between the panels. The panels exist as separate entities.</li> <li>- It is difficult to establish a close-knit community if there is no permanent body. This is not the case with WTO Panels</li> <li>- A permanent body also works faster than a temporary one.</li> </ul>	<ul style="list-style-type: none"> <li>- We always try to reach agreement, discussing the important issues. If there is something we cannot agree upon, the chairman will try to reach a compromise. Therefore, the chairman is key.</li> </ul>

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	Q5: Has the increase in the number of tribunals brought the issue of commonality to the forefront?	Q6: What are the advantages and disadvantages of commonality?	Q7: Do the advantages outweigh the disadvantages? Should there be commonality?	Q8: From the perspective of the judge, would common rules be desirable?
<b>Judge A (ICJ)</b>	<ul style="list-style-type: none"> <li>- The debate is definitely louder. The question is becoming more pertinent.</li> <li>- There is greater awareness of the problem, but the problem has not been addressed in an organized way. Ct. started to think more about commonality.</li> <li>-</li> </ul>	<ul style="list-style-type: none"> <li>- There are certainly advantages.</li> <li>- E.g., in Oil Platforms, the parties were confused by the Ct. There were no set rules.</li> <li>- The existing arrangement is unsatisfactory. There are concerns on this issue.</li> </ul>	<ul style="list-style-type: none"> <li>- Yes, it is a very good thing.</li> </ul>	<ul style="list-style-type: none"> <li>- Yes. A common set of rules can set out what is allowed/what is not, e.g. the hearsay is allowed for the ICJ but not the ICTY. Rules must be set out clearly.</li> </ul>
<b>Judge B (ICJ)</b>		<ul style="list-style-type: none"> <li>- We need to work on the evidential rules of the Ct.</li> <li>- The Ct. will perhaps address these issues after the Genocide Case. We have seen a whole range of issues to be dealt with.</li> <li>- The overlapping jurisdiction with tribunals disagreeing probably won't happen.</li> <li>- The tribunals do not disagree that much.</li> </ul>	<ul style="list-style-type: none"> <li>- Good but not realistic.</li> </ul>	<ul style="list-style-type: none"> <li>- Commonality would be good but not realistic to implement.</li> </ul>
<b>Judge C (ICJ)</b>		<ul style="list-style-type: none"> <li>- We don't need commonality. We can avoid the problems through other means.</li> <li>- We have always had a de-centralized system.</li> </ul>	<ul style="list-style-type: none"> <li>- We don't need commonality.</li> <li>- There are benefits to commonality but how much can we get people to agree on?</li> </ul>	
<b>Judge D (ITLOS)</b>	<ul style="list-style-type: none"> <li>- We note that tribunals are different. I think we can establish common rules for tribunals that are similar, e.g. criminal tribunals.</li> </ul>		<ul style="list-style-type: none"> <li>- There should be commonality as far as they are necessary.</li> <li>- There are already rules which are similar. Some tribunals follow the approach of others.</li> </ul>	<ul style="list-style-type: none"> <li>- We need it to the extent that is necessary. There are already some common principles that exist.</li> <li>- I think we do need to exchange ideas. The problem is a practical one.</li> </ul>
<b>Judge E (ITLOS)</b>	<ul style="list-style-type: none"> <li>- We are very aware of the increase in the number of tribunals.</li> <li>- There could be potential problems from inconsistent rules on evidence. But this is not just a PIL problem, also domestic courts where rules are often unclear. The standard in the domestic context still subject to interpretation and imprecision.</li> </ul>	<ul style="list-style-type: none"> <li>- Advantage: We don't want any forum shopping, even if the application of the rules is still subjective.</li> <li>- We must take note of this subjectivity.</li> <li>- The difference in evidential rules only matter under some circumstances.</li> </ul>	<ul style="list-style-type: none"> <li>- More important that the judges explain how they arrive at the conclusion. They must explain their subjectivity.</li> </ul>	<ul style="list-style-type: none"> <li>- Commonality would not solve the problem. The problem arises from the subjectivity of the judges. Judges will have to find a way to deal with this.</li> </ul>
<b>Judge F (ITLOS)</b>		<ul style="list-style-type: none"> <li>- If there are overlapping jurisdictions, then it is bad to have different rules.</li> </ul>	<ul style="list-style-type: none"> <li>- Judges need more interaction with one another. We need it.</li> <li>- We need same rules as far as possible.</li> <li>- Evidential rules should be the same. Choice should not be made from the different evidential rules. States should take other factors into account but not the evidential rules.</li> </ul>	<ul style="list-style-type: none"> <li>- Evidential rules should be the same for different tribunals.</li> </ul>
<b>Judge G (ITLOS)</b>	<ul style="list-style-type: none"> <li>- There are some rules which stretch across many tribunals, but it all depends on the</li> </ul>	<ul style="list-style-type: none"> <li>- Unpredictability from the current evidential rules is a problem. We must try</li> </ul>	<ul style="list-style-type: none"> <li>- There are no judicial tactics in international law, unlike domestic law. The</li> </ul>	

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	area of the law.	to cope with it. - Different rules leading to different results: even with different rules, tribunals would still reach the same result, but maybe through different reasoning. Opinion: the different courts would make sure that the results were consistent. - I can see the problem with different evidential rules.	results should not turn on a point of technicality. - Harmonization will come with time. It will be automatic. Since there is a dialogue between tribunals, things will gradually merge. - Tribunals are in a community now.	
<b>Judge H (ITLOS)</b>	- Not really. The issue is not at the forefront.	- There is no harm in stating the rules clearly, but to what extent of a difference will this make. - Advantage: commonality will make people more comfortable. It will put parties in the comfort zone. This is a good thing. - There are no disadvantages to commonality. Commonality may give perspectives of how to regulate the rules. - Disadvantage of international tribunals is the lack of rules, a problem that needs addressing.	- Current rules have no fundamental flaws, but there are no concrete rules either. - However, there is no harm in developing rules but current rules do not hinder the decision making process either.	- I am not sure whether commonality would be feasible. There is not enough recognition of the issues as yet. - If feasible, it is worth a go. - The tribunals might not see the need to develop common rules as yet, but you never know. Commonality is a very valid academic question. Your study could highlight the usefulness of commonality. - I have no objection to commonality.
<b>Judge I (ITLOS)</b>		- The flexibility of the rules can be an advantage or a disadvantage. There are no major problems because this is the nature of international tribunals. We have not had a serious problem with the flexibility. It has not been a hindrance.	- To a certain extent, there is a common set of rules already. Applying stricter rules would not be desirable or feasible. There have been no problems with the lack of rules so far.	
<b>Judge J (ITLOS)</b>		- It is very rare that tribunals share similar cases but this is possible.	- Opinion: No need to establish common rules. Flexibility is enough. - We will try to avoid inconsistency in the rules applied. This is important but we will have to see with future cases. This is not that important yet. - International tribunals might eventually go into a system of comity but this is to be seen.	
<b>Panelist K (WTO DSB)</b>	- The issue of commonality does not really crop up. - The issue is not at the forefront. - The increased case-load has pointed towards deficiencies within the WTO system.	- There are advantages to commonality. - Disadvantage: tribunals were created for different purposes. Would not be feasible to have a set of common rules for everything. On evidential rules, this does not apply because it is very narrow.	- Must note that tribunals are different. - However, on evidence, a common approach could work. There is merit in bringing some sort of commonality. - The notion of evidential rules is narrow enough for there to be commonality.	- Commonality would make everything simpler. - If commonality on evidential rules only, we should go ahead.
<b>Panelist L (WTO DSB)</b>	- Not really. The panelists follow the rules of the DSU. - Panelists do not adopt their own approach as such. We try to stay within the area of "interpretation".	- The WTO is a niche. Many see the AB and panels as the judiciary branch of the organization and the Members' meetings as the legislative branch.	- I see the merits to common rules. The problem of overlapping jurisdictions is very real. - The WTO panels apply general international law anyway so why can't it	- Commonality is desirable, mainly for the reason of consistency.

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			adopt procedural law as well as substantive law. We might need to adopt such rules in the future anyway.	
<b>Panelist M (WTO DSB)</b>	- Not really. There is not yet a community of courts.	- There is a problem with overlapping jurisdictions of tribunals, i.e. the same disputes leading to different results. This problem can get complicated. A common set of rules would reduce this difficulty but it will not eliminate it.	- There is no need for common rules. We can borrow from other tribunals. - Opinion: Good thing that parties can chose the forum. Part of the choice can be based on the particular governing instrument.	- We have to live with different evidential rules even though there might be problems. The solution is for one tribunal to grant deference to another. But then there is the hard question of who must give way.

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	<b>Q9: Is a set of common rules achievable? What and how should it be done?</b>	<b>Other Comments</b>
Judge A (ICJ)	<ul style="list-style-type: none"> <li>- We have suggested that courts should meet, but this was not desired by some judges.</li> <li>- A good model is a judicial club, perhaps starting in the Hague involving, e.g. Dutch courts, ICJ and ICTY. The chairman could be on rotation (opinion: not sure whether the ICJ would accept this).</li> <li>- Having inter-tribunal meetings would be good.</li> <li>- There could be an in-house debate.</li> <li>- Alternatively, we could feed the debate into a neutral like the Institut de Droit International, or PICT. There could be a conference.</li> <li>- The ILA has too many practitioners. We should concentrate on inter-state people.</li> <li>- These conferences can include NGOs.</li> </ul>	<ul style="list-style-type: none"> <li>- Q: The relationship between the tribunals is not easy to define. Do we rely on the facts established before another tribunal? Can we differ? Any consequences? What can be done?</li> <li>- Opinion: there will be a greater readiness to call independent experts in the future, e.g. Pulp Mills. I am a believer in division of labour.</li> <li>- I am for the opening up for amicus curiae briefs. Some other judges are not. The change in the composition of the Ct. can have an impact. With new judges, the approach will open up.</li> <li>- I do not agree that evidential rules should be a choice for States in choosing tribunals. (Interviewer: This has been suggested by members of ITLOS) It could be because ITLOS is under worked, a reason for this desire in choice. Evidential rules should be the decisive factor.</li> </ul>
Judge B (ICJ)	<ul style="list-style-type: none"> <li>- Commonality would be good but it is not quite realistic. It does help to articulate what we are doing.</li> </ul>	<ul style="list-style-type: none"> <li>- On experts: By calling someone as an expert, the court could be seen as pre-judging the issues. Hard to separate the expert from his published views. The Ct. does not want this. A commission of 3-5 people would be more feasible.</li> <li>- Team expert help on technical issues, taking us through the details. There is no examination of team experts but contrary arguments. Team experts tend to be the norm now. Team experts are time-saving. The information is of high standard with many honest views. International lawyers are not good at cross-examination.</li> </ul>
Judge C (ICJ)	<ul style="list-style-type: none"> <li>- There is already some dialogue between judges, but in an informal context such as dinners, etc. Opinion: Not sure what formality will achieve. E.g. Judge Higgins just went to ITLOS.</li> <li>- Commonality will emerge. People tend to borrow stuff from one another.</li> <li>- We have to be aware when our rules are different.</li> <li>- The work we do is diverse. We have to be careful we recognize this diversity.</li> <li>- Codifying the evidential rules will be difficult. It is a trial and error process.</li> </ul>	<ul style="list-style-type: none"> <li>- The SP of the Ct: cannot pinpoint. Have to look at the different judgments. Not a mechanical process. Ct reluctant to spell out the standard because of the different legal traditions. Civil lawyers need to be convinced whereas the Common lawyers use a more mechanical process. For the future, the standard depends on the case. If criminal case, we will apply relevant standard, almost like the Common Law standard. But, it depends. We would need an essentially criminal case. We cannot be precise about the definition of seriousness. Ex: It can be dangerous for the Ct to start seeking information. Would France and Australia be happy if the Court would just seek facts in the Nuclear Test Case?</li> </ul>
Judge D (ITLOS)	<ul style="list-style-type: none"> <li>- I am prepared to meet with other tribunals. But I think the ICJ is sometimes not prepared. The amount of dialogue depends on the personality of the judge, e.g. some judges at the ICJ support us and some don't.</li> <li>- There could be contact between the registrars.</li> <li>- Having the ICJ at the top of the hierarchy for this purpose might work but there are also political issues to consider. I don't think it is that feasible. States have not created tribunals in a hierarchical format. They are for multiplication of tribunals.</li> <li>- Meetings between tribunals now and then seems like a good idea, if the ICJ would come. This depends on the personality of the judges and the ICJ's President.</li> </ul>	<ul style="list-style-type: none"> <li>- At the beginning, members of the Tribunal were not concerned with evidential issues. We did not decide on a particular approach.</li> <li>- The problem with international law is the lack of evidence.</li> <li>- There is also a lack of time. We don't even have time to read the evidence. There have been criticisms that we cannot assess the evidence properly. These issues will come to the forefront with full merits cases.</li> <li>- We try to avoid the fragmentation of international law as much as possible.</li> <li>- Opinion: some members of the ICJ feel that they are being threatened (by other tribunals). Some judges think there is no need for many tribunals when one will do.</li> </ul>
Judge E (ITLOS)		<ul style="list-style-type: none"> <li>- On technical rules, the rules are satisfactory as far as they go. There are not many rules and the ones in the provisions do not touch the real issues.</li> <li>- The ICJ has applied a high standard, e.g. the Corfu Channel Case. The ECHR applies the BRD standard. The American Court of HR, the standard is PoE.</li> <li>- The standard of the ICJ can vary. If there are issues with negative constitution, then apply BRD. Anything else, apply PoE. Opinion: This is satisfactory.</li> <li>- However, most tribunals are not clear on the standard they use.</li> <li>- Even if we stipulate what the standard is, there are still questions on its exact definitions. This is subjective.</li> </ul>

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		<ul style="list-style-type: none"> <li>- It will be good if the judge can be under an obligation to explain what they have decided. Judges must be aware of the subjectivity.</li> <li>- There are also other uses for experts, e.g. Strait of Johor, where experts were used for a different purpose.</li> <li>- The common law judge will sit back while the civil law judge will be more inquisitorial.</li> </ul>
Judge F (ITLOS)	<ul style="list-style-type: none"> <li>- International judges should look at the domestic level. Domestic judges have meetings and conference. We should have this.</li> <li>- A set of rules should be established to make States comfortable.</li> <li>- The best way is through the initiation of the Presidents. There can be seminars of judges.</li> <li>- We also need more involvement from developing countries. At the moment, everything is focused on Europe.</li> <li>- There should be meetings of people including professors and practitioners so they can exchange hands-on experience.</li> </ul>	<ul style="list-style-type: none"> <li>- The flexibility of rules also brings in some problems. Sometimes, we cannot control what is submitted and it is very time consuming.</li> <li>- We are 21 judges here so it is hard just to follow one domestic approach. Each judge just writes his opinion. Note: many judges here are legal diplomats.</li> <li>- The system here is almost like a jury system. We just sit back, listen and decide. We don't really ask many questions.</li> <li>- We must note that the international system is different.</li> <li>- International litigation tries to please both sides. A court is supposed to make a judicial decision.</li> </ul>
Judge G (ITLOS)	<ul style="list-style-type: none"> <li>- We must be careful when applying same rules to different matters. Tribunals are different, e.g. prompt release cases here, time limits are different.</li> </ul>	<ul style="list-style-type: none"> <li>- Generally, evidence problems are municipal problems. On the international plane, the problem could arise from the flexibility of the rules but the rules are flexible to cope with the nature of international law.</li> <li>- The rules applied depend on the nature of the case.</li> </ul>
Judge H (ITLOS)	<ul style="list-style-type: none"> <li>- International tribunals bring together many legal cultures. Sometimes difficult to formulate rules which will suit everyone.</li> <li>- The judge should keep an open mind, welcoming rules that will help him reach the final decision. Judge should not seek new things to be fashionable but should not refuse new things because they are not used to them either.</li> <li>- I have suggested for there to be a dialogue. Useful to have one. Presidents can meet for an inter-tribunal dialogue.</li> <li>- Could try to copy UN system where agencies meet on a regular basis with the Sec-Gen as the president of the meetings. The ICJ President could act as president. This development will be slow but worth it.</li> <li>- There needs to be a brainstorm between the courts and absorb each other's ideas. Each would be better off. If they reject each other's approach, then they know why they are rejecting it.</li> <li>- There might be problems of implementation. Who will initiate it?</li> <li>- We can start by having commonality for one aspect of evidential rules, e.g. ACs. There needs to be a dialogue between the tribunals. If there are rules which the parties need setting out, would be good to do it.</li> <li>- The implementation of commonality is possible but could be difficult to achieve.</li> <li>- Common rules would need to recognize the specialization of tribunals, and hence cannot be too complicated.</li> <li>- Commonality will put parties at ease knowing that they can expect the same thing from Court A and Court B. This is good.</li> <li>- But common rules must not be too complicated as to create new problems. The details must be examined carefully.</li> </ul>	<ul style="list-style-type: none"> <li>- No international court has really been explicit and spelled out one set of standards for evidential rules.</li> <li>- We must distinguish between evidence of facts and evidence of law.</li> <li>- Rules in international courts are often made by scholars and not in the provisions themselves.</li> <li>- The drafters of the provisions recognized the need for experts. We are not bound by what the experts say but their advice often leads the tribunal to the conclusion.</li> <li>- The WTO system works well because they have experts assessing party expert evidence, meaning the right questions are asked. Useful to have independent experts if the party evidence is completely contrary.</li> <li>- Many tribunals are moving towards letting in ACs. Opinion: the ICJ will accept them in the future. We can accept anything because we don't have to follow them.</li> <li>- Opinion: the courts consider themselves as different, but there are many things which are the same. So many things in common.</li> <li>- Courts can learn from one another. They must study each other.</li> <li>- Must note: the regime as it is has nothing missing but it will be useful to have rules available.</li> <li>- Opinion: the overlap of jurisdiction is a good thing. States might not be willing to go before one tribunal for any reason so there should be choice for it to go elsewhere. The choice does not have to arise from the choice in procedural rules.</li> <li>- Opinion: If the evidential rules do not completely oppose one another, then it should be ok, but it is nice to have one set of neat rules.</li> <li>- It is unlikely that two exact same disputes could arise before two tribunals.</li> <li>- We have always had many courts. There has always been overlapping jurisdictions. Forum shopping should not be a problem because for there to be jurisdiction, there needs to be the consent of both parties. But this could always happen.</li> <li>- States should have a choice. More choice means more chance of using 3<sup>rd</sup> party settlement.</li> </ul>
Judge I (ITLOS)		<ul style="list-style-type: none"> <li>- The potential conflicts between the jurisprudence of different tribunals also depend on whether they share similar cases, e.g. ITLOS and WTO do not share many cases. Even if cases are similar before two tribunals, the aspects of the cases before the two tribunals would probably be</li> </ul>

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		<p>different anyway. But there could be problems in cases such as those concerning delimitation where tribunals would be dealing with similar aspects of a case.</p> <ul style="list-style-type: none"> <li>- A lot of the rules that are laid down are just a guidance. There is a degree of fuzziness.</li> <li>- Opinion: Forum shopping is a good thing. The more choice, the better. This will encourage States to resolve disputes through 3<sup>rd</sup> party adjudication. The disadvantages are not unmanageable. Tribunals do not try to contradict one another. We give respect to the ICJ.</li> <li>- If the trend of the specialization of tribunals continues, then competing jurisdictions would not be too much of a problem.</li> </ul>
Judge J (ITLOS)	<ul style="list-style-type: none"> <li>- The key is that everybody should be aware of what is going on and keep in touch. It is better to be cooperative.</li> <li>- Opinion: we will eventually try to merge the rules.</li> <li>- Any proposed changes would have to consider whether there is legal backing.</li> <li>- Opinion: Question: Is it worthwhile to have something formal? In ten years, something might have to be done. We have to learn more and gather experience.</li> <li>- The question of evidence should be high on the agenda. Once we get more cases, it will be on our agenda.</li> </ul>	<ul style="list-style-type: none"> <li>- Forum shopping is not such a bad thing. Tribunals exist separately. This will be the case unless we seek into account other tribunals.</li> </ul>
Panelist K (WTO DSB)	<ul style="list-style-type: none"> <li>- It is up to the governments and not the panels to change the rules on evidence.</li> <li>- We should work out a "best practices" for the purposes of referrals by various tribunals.</li> <li>- It is up to the various governments to take the initiative but we could get a consensus on it because it is quite a narrow area.</li> <li>- The ICJ could take the initiative in leading this and passing the rules down.</li> </ul>	<ul style="list-style-type: none"> <li>- I would like to say something related to SP. There is an issue with confidential information that the defendant holds. This case was about a dumping measure, but this issue also applies to many subsidies cases. The defendant was in a much stronger position because they had info. The WTO rules say that the claimant had to prove the standing but the needed information was confidential. This made it difficult. It was hard to meet the SP set.</li> <li>- Perhaps the SP should be reversed in such cases making it easier for the claimant and harder for the defendant. This should be the case of area of subsidies.</li> <li>- Opinion: A lot of the expert evidence of the WTO is written. I want more oral evidence.</li> <li>- Note: The chairman of the panels is very diplomatic. If the parties don't know something, they can go away and prepare it. There is a relaxed atmosphere. In contrast, the AB is much more aggressive.</li> </ul>
Panelist L (WTO DSB)	<ul style="list-style-type: none"> <li>- However, a common set of rules would not be achievable in the near future. There is no immediate reason for the WTO to adopt the rules of other tribunals. Our rules work well in our own world.</li> <li>- The initiative must come from the members. They are the ones who can change the rules.</li> <li>- We can only do this through a reform of the DSU. To my knowledge, this is not on the agenda. There is no motivation or drive or change as yet.</li> </ul>	<ul style="list-style-type: none"> <li>- The panelists are not entitled to have or adopt a policy as such. Rules are already set out and can be found in the DSU and the jurisprudence. Panelists just apply the rules as they already exist. We are careful not to go beyond what was said by the AB.</li> <li>- The non-lawyers panelists were not too bothered about technical rules.</li> <li>- Opinion: The AB is trying to deal with a clash of legal cultures and avoiding this clash. But the dominating legal culture is the Anglo-Saxon one.</li> <li>- The current rules are satisfactory as far as they are applied in a consistent manner.</li> <li>- The marriage of the legal cultures is not a bad thing.</li> </ul>
Panelist M (WTO DSB)	<ul style="list-style-type: none"> <li>- The WTO needs to shift towards more formality. At the moment, it is like a meeting, e.g. the witnesses are not tested as much as they should be.</li> </ul>	<ul style="list-style-type: none"> <li>- When compared to the English system, international law takes a relaxed view towards evidential rules. This is mirrored, for example, by the fact that non-lawyers can present the case before international courts. The rules are relaxed.</li> <li>- Opinion: Both oral and written evidence should be presented. There are benefits to both. Written evidence can provide more formality but oral evidence can provide spontaneity.</li> </ul>

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